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Supreme Court, U.S.
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In The Supreme Court of the United States

COLEMAN JACKSON,

Petitioner,

v.

STATE BOARD OF PARDONS AND PAROLES, DEPARTMENT OF OFFENDER REHABILITATION, STATE OF GEORGIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Prison Litigation Reform Act, 42 U.S.C. § 1997e, applying to actions involving prison conditions, apply to restrict and limit attorney's fees for incarcerated inmate challenges to underlying convictions or the duration of sentences to serve?

2. Do the restrictions and limitations on attorney's fees in the Prison Litigation Reform Act, 42 U.S.C. § 1997e, violate equal protection, access to courts, and right to counsel if applied to restrict and limit incarcerated inmate challenges to underlying convictions or the duration of sentences to serve?

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The opinion of the United States Court of Appeals for the Eleventh Circuit, May 20, 2003, holding that the Prison Litigation Reform Act, 42 U.S.C.§ 1997e, applies to limit attorney's fees in a successful action brought under 42 U.S.C. § 1983 constitutionally contesting the ex post facto extension of Petitioner's sentence to serve is set forth in the Appendix at A-1. The order of the United States District Court for the Northern District of Georgia, September 10, 2002, deciding that the definitional subsection of 18 U.S.C. § 3626(g)(2) applies to modify the Prison Litigation Reform Act, 42 U.S.C. 1997e, in order to apply the attorney's fees limitation to a successful ex post facto challenge to the Petitioner's sentence to serve is set forth in the Appendix at A-15. The order of the United States District Court for the Northern District of Georgia, May 30, 2002, holding the retroactive extending of the Petitioner's sentence to serve in violation of ex post facto protections of the United States Constitution is set forth in the Appendix at A-40.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on May 20, 2003. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254. Because this Petition for Writ of Certiorari has drawn into question the constitutionality of 42 U.S.C. § 1997e as interpreted by the United States Court of Appeals for the Eleventh Circuit, 28 U.S.C. § 2403 (a) may apply and therefore a copy of this Petition for Writ of Certiorari is being served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W. Washington, D.C. 20530-0001. The United States Court of Appeals for the Eleventh Circuit did not, pursuant to 28 U.S.C. § 2403 (a), certify to the Attorney General the fact that the constitutionality of 42 U.S.C. § 1997e was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I. SECTION 9. No...ex post facto law shall be passed.

ARTICLE I. SECTION 10. No State... shall pass any...ex post facto law...

AMENDMENT V. No person shall be held to answer ... nor be deprived of life, liberty, or property without due process of law;

AMENDMENT VI. In all criminal prosecutions, the accused shall enjoy ... and to have the assistance of counsel for his defense.

AMENDMENT XIV. SECTION I. ...nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1988. Proceeding in vindication of civil rights

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a. 1982, 1983, 1985 of this title IX ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee ...

42 U.S.C. § 1997e. Suits by prisoners

(d) Attorney' fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that –

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the court ordered relief for the violation.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

(g) Definitions. – As used in this section –

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

STATEMENT OF THE CASE

The underlying United States District Court action, arising under 42 U.S.C. § 1983, enjoined the continued enforcement of an unpublished administrative policy of the Georgia State Board of Pardons and Paroles ("Board") having an unpublished "effective date" of January 1, 1998, which required that Plaintiff ("Petitioner" herein) and other similarly situated inmates sentenced in twenty listed offenses serve ninety percent of their sentences before being considered for parole and the Board retroactively applied this unpublished policy to offenses committed prior to the "effective date" thereby increasing the duration of inmates' sentences to serve before being considered for parole which under Georgia parole statutes should be considered for parole after serving the greater of one-third of their sentences under O.C.G.A. § 42-9-45 or the months to serve of their sentences calculated under the statutorily mandated Parole Decision Guidelines pursuant to the O.C.G.A. § 42-9-40.

Senior United States District Court Judge, William C. O'Kelley signed an order May 29, 2002, filed May 30, 2002, holding that the Board's retroactive enforcement of the ninety percent to serve policy is unconstitutional in violation of the ex post facto prohibitions of the United States Constitution and the District Court enjoined the Board from taking any actions to carry out or enforce the ninety percent time served policy as it relates to Plaintiff Coleman Jackson and further ordered the Board to consider the Plaintiff's parole eligibility without regard to the ninety percent time served policy. (District Court order May 30, 2002 p. 29, Appendix A-62) In compliance with the District Court's order, the Defendant Board ("Respondent" herein) notified the District Court on June 12, 2002 of its action in granting the Plaintiff, Coleman Jackson, parole and initiated his immediate release. (District Court order September 10, 2002 p. 3, Appendix A-17) The Defendant Board did not appeal the underlying order of the District Court of May 30, 2002.

The Defendant Board publicly stated that because of the result in the Coleman Jackson case that the Board was initiating review of the parole dates of 2,200 similarly situated inmates without regard to the ninety percent to serve policy. (District Court order September 10, 2002 p. 3, Appendix A-17)

Following the successful result in the underlying civil rights case, Plaintiff's attorney filed a motion for an award of reasonable attorney's fees and costs pursuant to the Civil Rights Attorneys Fees Award Act, 42 U.S.C. Section 1988, in the amount of $34,875.00 for attorneys fees. The Defendant Board filed objections contending that the Prison Litigation Reform Act ("PLRA") severely limited the award of attorney's fees, and further objected to just about every item of the attorney's fees request that the hours spent were not "directly and reasonably incurred in proving an actual violation of the Plaintiff's rights" according to the restrictions of the PLRA. Plaintiff filed a reply brief arguing that the PLRA only applied to actions concerning "prison conditions" and was inapplicable to an ex post facto constitutional challenge to a quasi legislative policy of the Georgia State Board of Pardons and Paroles which retroactively increased the duration of the Plaintiff's sentence to serve and raised constitutional questions if the PLRA were applied in this case to discriminate against incarcerated inmates.

The District Court issued an order on the motion for award of attorney's fees and costs on September 10, 2002 noting that this was an issue of first impression and finding that in spite of the PLRA's limitation to actions with respect to "prison conditions" that the PLRA applied to the underlying case involving the constitutional invalidating of a parole board policy which extended the length of the duration of the inmate's sentence to serve. (District Court order September 10, 2002 p. 7-10, Appendix A-21-24) The District Court then followed the restrictive provisions of the

PLRA limiting the amount of allowable hourly rate and scope of allowable hours to award reduced attorney's fees in the amount of $9,194.82. (District Court order September 10, 2002 p. 29, Appendix A-39)

An appeal was taken to the United States Court of Appeals for the Eleventh Circuit from the District Court's order of September 10, 2002 finding that the PLRA applies to limit attorney's fees in the underlying case involving a successful constitutional and civil rights challenge of Petitioner's sentence to serve.

The United State Court of Appeals for the Eleventh Circuit on May 20, 2003 affirmed the District Court, albeit on different grounds, taking § 1997e(d) out of its context within the PLRA, ruling that the PLRA restrictions and limitations on attorney's fees applies to "any action brought by a prisoner" and "means all lawsuits that are filed by a prisoner and is not restricted to lawsuits challenging 'prison conditions' that are filed by a prisoner." (Eleventh Circuit opinion at p. 10, Appendix A-8). The Court of Appeals then held that the PLRA's restrictions and limitations on attorney's fees did not violate equal protection and declined to consider the access to courts and right to counsel constitutional issues.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER THE PRISON LITIGATION REFORM ACT, 42 U.S.C. § 1997e, APPLIES TO LIMIT AND RESTRICT ACTIONS BY INCARCERATED INMATES CONTESTING THEIR UNDERLYING CONVICTIONS OR SENTENCES TO SERVE.

This case presents the fundamental issue of first impression of whether the Prison Litigation Reform Act applies to restrict and limit inmates' ability to contest their underlying convictions or length of their sentences to serve once they have become incarcerated. And interpreting the PLRA to apply to restrict access to the courts and limit attorney's fees by incarcerated defendants which are not imposed on non-incarcerated defendants raises troubling constitutional issues under Equal Protection as well as the Fifth and Sixth Amendments. The United States Court of Appeals for the Eleventh Circuit in the underlying decision held that the PLRA does limit attorney's fees in a §1983 challenge to the Petitioner's sentence to serve solely because he was incarcerated at the time that the collateral relief action was brought. *Coleman Jackson v. State Board of Pardons and Paroles*, Case No. 02-15545 (11th Cir. 2003) (Appendix A-1).

The United States Court of Appeals for the Seventh Circuit has held the opposite that the restrictions and limitations of the PLRA do not apply to collateral attacks to underlying criminal convictions or sentences to serve, concluding that a line is drawn between collateral attacks that are in some way related to the original criminal proceeding and actions under the PLRA relating to prison conditions. *Walker v. O'Brien*, 216 F. 3d 626 (7th Cir. 2000). Other Courts of Appeals early after the passage of the PLRA have held that the restrictions and limitations of the PLRA

would not apply to habeas corpus collateral attacks. *Davis v. Fechtel*, 150 F.3d 486 (5th Cir. 1998); *McIntosh v. United States Parole Commission*, 115 F. 3d 809 (10th Cir. 1997); *Blair-Bey v. Quick, 151 F. 3d 1036 (D.C. Cir. 1998)*; *Martin v. Bissonette*, 118 F. 3d 871 (1st Cir. 1997; *Reyes v. Keane*, 90 F. 3d 676 (2nd Cir. 1996); *Santana v. United States*, 98 F. 3d (3rd Cir. 1996); *Smith v. Angelone,* 111 F. 3d 1126 (4th Cir. 1997); *Kincade v. Sparkman*, 117 F. 3d 949 (6th Cir. 1997); *Naddi v. Hill*, 106 F. 3d 275 (9th Cir. 1997); and *Anderson v. Singletary*, 111 F. 3d 801 (11th Cir. 1997).

II. THE RESTRICTIONS OF THE PRISON LITIGATION REFORM ACT AND ITS ATTORNEY'S FEE LIMITATIONS APPLY ONLY TO ACTIONS INVOLVING PRISON CONDITIONS BROUGHT BY INMATES AND ARE INAPPLICABLE TO CHALLENGES TO UNDERLYING CONVICTIONS OR SENTENCES TO SERVE.

The Eleventh Circuit took the PLRA attorney's fees limitation out of context of its imbedding within the PLRA which clearly applies only to "prison conditions" and isolated the literal language § 1997e(d) to restrict attorney's fees "in any action brought by a prisoner." The opinion only analyzed that since other provisions of the PLRA apply to "prison conditions" and since Congress did not specify "prison conditions" in the subsection limiting attorney's fees, concluding this limitation on attorney's fees "applies to all lawsuits that are filed by a prisoner" (Eleventh Circuit opinion, note 10, p. 10, Appendix A-8) and that the PLRA limitation on attorney's fees is "not restricted to lawsuits challenging 'prison conditions' that are filed by a prisoner." (Eleventh Circuit opinion, p.10, Appendix A-8-9).

The Prison Litigation Reform Act throughout applies to actions brought with respect to "prison conditions." Sequentially imbedded within the act are provisions limiting attorney's fees, which as the PLRA should be interpreted as

a whole, would only apply to actions brought by inmates concerning prison conditions. The District Court had taken a different approach from the Eleventh Circuit opinion and interpreted the PLRA in conjunction with 18 U.S.C. § 3626 (g) (2), "Appropriate Remedies with Respect to Prison Conditions" relating to prospective relief in prison cases involving prison overcrowding and other conditions providing limitations on remedies and further provides that:

> "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;"

The District Court's order points out correctly that the United States Supreme Court in *Porter, et al. v. Nussle*, 534 U.S. 516, 525 (2002) expressly declined to apply Section 3626(g)(2) to the PLRA wherein footnote 3 of the majority opinion stated, "We rest our decision on the meaning of 'prison conditions' in the context of Section 1997e, and *express no definitive opinion on the proper reading of Section 3626(g)(2).*" (Emphasis supplied). (District Court opinion September 10, 2002 at p. 8, Appendix A-21) However, the District Court then went on to consider this footnote as actually condoning the use of Section 3626(g)(2) to expand the definition of "prison conditions" in the PLRA. The District Court also cited Eleventh Circuit cases which did involve prison conditions in excessive use of force cases of *Higginbottom v. Carter*, 223 F. 3d 1259 (11th Cir. 2000) and *Johnson v. Breeden*, 280 F. 3d 1308 (11th Cir. 2002). These cases did not involve a challenge of the length or duration to serve of an inmate's sentence as the underlying case does.

Even assuming arguendo the District Court's importation of § 3626 into the PLRA, § 3626 is clearly not to be interpreted to apply to limit actions or attorney's fees concerning the entitlement of an individual prisoner to release from the length of duration of their underlying sentence. The District Court in citing § 3626(g)(2) did not consider the express caveat that the definition of "civil action with respect to prison conditions" would not apply to habeas corpus proceedings *"challenging the fact or duration of confinement in prison."* (Emphasis supplied).

The instant case was brought in two counts of habeas corpus and equitable relief under §1983 both seeking the same collateral relief of constitutionally invalidating the Georgia Parole Board's ninety percent to serve policy and challenging Coleman Jackson's continued duration in confinement without being considered for parole after he had served the statutory one-third of his sentence pursuant to O.C.G.A. § 42-9-45 and the recommended months to serve calculated under the statutory mandated Parole Decision Guidelines pursuant to O.C.G.A. § 42-9-40. The equitable relief sought under § 1983 is essentially the same as that sought in the habeas corpus count with both counts seeking Plaintiff Coleman Jackson's release on parole and neither of these counts had anything to do with "prison conditions" as used in the PLRA, but these counts had everything to do with the length of duration of his sentence to serve. The United States Supreme Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), has found that a § 1983 action concerning the legality of an inmate's conviction should be treated the same as a habeas corpus petition.

The case of *Walker v. O'Brien*, supra, distinguishes actions concerning prison conditions to which the PLRA would apply from federal collateral attacks on the underlying criminal conviction or sentence. The Seventh Circuit cited in support that the PLRA does not apply to

requests for collateral relief under 28 U.S.C. § 2241, 2254, or 2255, *Davis v. Fechtel*, 150 F. 3d 486 (5th Cir. 1998), *McIntosh v. United States Parole Commission*, 115 F. 3d 809 (10th Cir. 1997), and *Blair-Bey v. Quick*, 151 F. 3d 1036 (D.C. Cir. 1998), and further cited Circuit Court decisions holding that the PLRA does not apply to state or federal inmates filing habeas corpus petitions, *Martin v. Bissonette*, 118 F. 3d 871 (1st Cir. 1997), *Smith v. Angelone*, 111 F. 3d 1126 (4th Cir. 1997), and *Anderson v. Singletary*, 111 F.3d 801 (11th Cir. 1997). The *Walker v. O'Brien* opinion also reaffirmed broadly the basic differences that support a clear line between civil actions attacking conditions of confinement (subject to the PLRA) and collateral actions attacking the fact or duration of confinement as "the reasons that our nine sister circuits have given for coming to the conclusion that the PLRA does not apply to habeas corpus or *other collateral relief* (Emphasis supplied)." 216 F. 3d 626, 656.

The District Court interpreted the § 3626 definition of "actions with respect to prison conditions" to include actions that seek to shorten the duration of an inmate's sentence as inclusive in the sub-definitional language "the effects of actions by government officials *on the lives of persons confined in prison*." (Emphasis supplied). (District Court order September 10, 2002 at p. 7, Appendix A-23) This language is referring to actions of government officials that affect the prisons conditions of inmates such as overcrowding and not the duration of their term in prison. This provision seeks to discourage actions filed by inmates against prison officials affecting prison conditions on the lives of inmates while in prison. Nowhere is there any intention to apply this sub-definition to the length of the duration of inmates' sentences to serve. The very next phrase is a caveat against applying the definition to the conviction or length of sentences sought by way of habeas corpus. By parody of reasoning § 1997e should not apply to a similar

action under § 1983 seeking the same relief in shortening the duration of the length of inmates' sentences to serve.

The legislative history even demonstrates the intent of Congress that the Prison Litigation Reform Act was "focused on prison conditions." House Report 21, Title III. The Second Circuit has defined the Prison Litigation Reform Act's scope of "prison conditions" as "those aspects of prison life affecting the entire prison population, such as the food, medical care, recreational facilities, and the like" in *Lawrence v. Goord*, 238 F.3d 339 (2nd Cir. 2001). The Eleventh Circuit has upheld limitations under the Prison Litigation Reform Act solely because the case involved "an action with respect to prison conditions." *Johnson v. Breeden*, 280 F.3d 1308, 1324 (11th Cir. 2002). The United States Supreme Court case of *Porter, et al. v. Nussle*, 534 U.S. 516, (2002) was an excessive force case and involved "prison conditions." The underlying case is an entirely different animal and involves a frontal attack on the constitutionality of a quasi-legislative policy of the Georgia State Board of Pardons and Paroles. The underlying case is a post conviction collateral attack on the duration of a sentence essentially similar in relief sought by habeas corpus.

This case is exactly the type of case which was contemplated by the legislative history of 42 U.S.C. § 1988 wherein Congress recognized that suitors who need to secure their civil rights often "cannot afford legal counsel" and that they therefore experience "undue hardship" and Congress enacted 1988 to ensure that non-affluent Plaintiffs would have "effective access" to the nation's courts to enforce civil rights abuses. H. R. Report No 94-1558 (1976). Coleman Jackson, an indigent, could not afford to pay an attorney and would not have had an attorney appointed for him in a civil rights action. This action by an interested attorney was the only way he could have vindicated his civil rights that had been trampled by the unconstitutional actions of the Respondent Board which would have buried him in very

substantial additional prison time retroactively increasing his sentence to serve from one-third to ninety percent of his judicial sentence.

The decision of the United State Court of Appeals for the Eleventh Circuit limiting attorney's fees by applying the PLRA to a meritorious civil rights case involving the duration to serve of the Petitioner's sentence should be reversed and remanded with directions that attorney fees be determined under the well developed reasonable attorney's fees standards of the Civil Right Attorney's Fees Award Act, 42 U.S.C.§ 1988, as announced by the United States Supreme Court in *Hensley v. Eckerhart* 461 U.S. 424 (1983). If reasonable attorney's fees are not awarded in such cases, then the purpose of the civil rights laws may be thwarted by discouraging attorneys from taking on even just and meritorious cases. To interpret the PLRA to apply to post conviction remedies will have a chilling effect on attorneys taking meritorious cases on a totally contingent basis when they are certain to be under compensated, even if they prevail. The likelihood will be that attorneys will surrender cheaply rather than fight dearly.

III. THE UNITED STATES COURT OF APPEALS DECISION HAS DECIDED AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AS TO WHETHER THE LIMITATIONS AND RESTRAINTS ON ATTORNEY'S FEES OF THE PRISON LITIGATION REFORM ACT, 42 U.S.C. § 1997e, CONFLICT WITH EQUAL PROTECTION, ACCESS TO THE COURTS, AND RIGHT TO COUNSEL PROTECTIONS OF THE UNITED STATES CONSTITUTION WHEN APPLIED TO RESTRICT INCARCERATED INMATES CONTESTING THEIR UNDERLYING CONVICTIONS OR LENGTH OF SENTENCES TO SERVE.

The Decision of the United States Court of Appeals for the Eleventh Circuit after finding that the attorney's fees limitations of the Prison Litigation Reform Act would apply without restriction to any action brought by an incarcerated inmate, thus brought into question the constitutionality of such a broad holding to restrict and limit an inmate's contesting of their underlying conviction or their sentence to serve. It is submitted that the constitutional questions are of first impression and the decision of the Court of Appeals conflict with relevant and fundamental constitutional protections of equal protection, access to the courts, and right to counsel guaranteed by the Fifth and Sixth Amendments of the United State Constitution.

The Court of Appeals decision opined that access to the courts was not denied because the Petitioner Coleman Jackson had brought a successful court challenge with the aid of an attorney. However, the decision ignored the admittedly clear restraints and limitations of the PLRA to access to the courts. The decision also found that inmates were not a suspect class and therefore heightened scrutiny was not warranted. Then, the decision recited the

discriminatory reasons for the PLRA limitations of decreasing marginal, frivolous, or trivial lawsuits. But, pursuing a successful constitutional attack on an illegal sentence to serve is not marginal, frivolous, or trivial.

It would be constitutionally improper to differentiate between an incarcerated prisoner collaterally attacking an illegal sentence and the same collateral attack of a sentence by a defendant who was not imprisoned. It would be unconstitutional under the equal protection clause to permit full attorney's fees awards under 42 U.S.C. § 1988 to a successful Plaintiff who was not incarcerated being free on bond while attacking the same ninety percent to serve rule but limiting the attorney's fees award involving a successful Plaintiff who was unfortunately incarcerated while challenging the conviction or the length of the sentence to serve.

IV. THE PRISON LITIGATION REFORM ACT SHOULD BE INTERPRETATED TO ONLY APPLY TO PRISON CONDITION AND NOT REACH THE CONSTITUTIONAL QUESTIONS.

The simple answer to this inconsistency is that the PLRA's attorney fees limitation only applies to inmates bringing actions relating to "prison conditions," and does not apply to other civil rights actions which happen to have been brought by inmates seeking relief from their conviction or the duration of their sentences to serve while incarcerated. The Third Circuit split in an en banc decision as to the Equal Protection constitutionality of the attorney's fees limitation in a case involving prison conditions in *Collins v. Montgomery City Board of Prison Inspectors*, 176 F. 3d 679 (3rd Cir. 1999). Other Circuits have upheld the constitutionality of the Prison Litigation Reform Act when applied to prison conditions affecting incarcerated inmates. The underlying Court of Appeals decision cited: *Foulk v. Charrier*, 262 F. 3d 687, 704 (8th Cir. 2001; *Walker v. Bain*,

257 F. 3d 660, 670 (6th Cir. 2001); *Hadix v. Johnson*, 230 F. 3d 840, 847 (6th Cir. 2000); *Boivin v. Black*, 225 F. 3d 36,46 (1st Cir. 2000); *Madrid v. Gomez*, 190 F.3d 990, 995-96 (9th Cir. 1999). However, there has been no decision in the United States Circuit Courts of Appeals before the underlying Eleventh Circuit decision applying the PLRA limitations and restraints to an action seeking to contest an inmate's conviction or underlying sentence to serve, much less considering the Equal Protection, or Fifth and Sixth Amendment constitutional implications. The rationale of limitations of the PLRA in discouraging actions concerning "prison conditions" would not support the arbitrary disparity of treatment between an incarcerated inmate and a non-incarcerated inmate seeking to have the duration of their sentences shortened and vindicating their constitutional and civil rights, as in the underlying case.

It was argued by Petitioner before the District Court and Court of Appeals that Courts need not reach the constitutional questions simply by holding that the PLRA and its "prison conditions" limitation does not apply to the instant case which only sought to shorten the duration of the sentence to be served of Petitioner Coleman Jackson and to constitutionally invalidate a quasi legislative policy of the Respondent Board. Far back in the United States Supreme Court history Chief Justice Marshall announced that constitutional issues should not needlessly be confronted in *Murray v. The Charming Betsey,* 6 U.S. 64 (1808). And recently the United States Supreme Court in *Jones v. United States*, 529 U.S. 848, 867 (2000) followed *United States, ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1909) that "where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other such questions are avoided, our duty is to adopt the latter."

The definitional provision in 18 U.S.C. § 3626(g)(2) which the District Court imported into the PLRA, 42 U.S.C.

§ 1997e, excludes "habeas corpus proceedings challenging the fact or duration of confinement in prison." This action for equitable relief under 42 U.S.C. § 1983 is virtually identical in relief and result to a habeas corpus proceeding in challenging the Plaintiff's duration of confinement in prison.

The Eleventh Circuit has had occasion to rule that a habeas corpus petition is not subject to the PLRA in *Anderson v. Singletary*, 111 F. 3d 801 (11th Cir. 1997) and was reaffirmed in *Bryan v. Singletary* 140 F. 3d 1354 (11th Cir. 1998). Every other Circuit Court of Appeals which has considered the issue has held that the PLRA does not apply to habeas corpus actions and for good reason as the First Circuit explained in *Martin v. Bissonette*, 118 F. 3d 871, 878 (1st Cir. 1997), that "Congress in enacting the PLRA, took dead aim at suits challenging conditions of confinement, and nothing in either the PLRA's text or its legislative history suggests that habeas cases were perceived to comprise a part of this problem." Cases which have reached a similar result are: *Smith v. Angelone*, 111 F. 3d 1126 (4th Cir. 1997); *United States v. Levi*, 111 F 3d 955 (D.C. Cir. 1997); *United States v. Simmonds*, 111 F. 3d 737 (10th Cir. 1997); *Naddi v. Hill*, 106 F. 3d 275 (9th Cir. 1997); *United States v. Cole*, 101 F. 3d 1076 (5th Cir. 1996); and *Santana v. United States*, 98 F. 3d 752 (3rd Cir.1996).

Since the equitable relief sought under § 1983 in the instant case is virtually identical to the relief under habeas corpus in collaterally attacking an underlying conviction or sentence to serve, then by parody of reasoning the PLRA does not apply to equitable actions only seeking relief from an underlying unconstitutional conviction or the sentence to serve. The State's contention is simply furthering the discrimination that the PLRA should now extend to inhibit inmates' rights to contest their convictions or sentences to serve even in face of meritorious constitutional vindication.

If under the State's contention that inmates should be inhibited in compensating attorneys in cases contesting underlying convictions and sentences, defendants may be similarly restrained in compensating their attorneys for direct appeals as well as habeas corpus and civil rights collateral attacks. Prejudice and discrimination once let loose are not easily cabined.

V. THE IMPOSITION OF ATTORNEY'S FEE RESTRAINTS UPON INCARCERATED INMATES LIMITS ACCESS TO THE COURTS AND THE RIGHT TO COUNSEL PROTECTED UNDER THE UNITED STATES CONSTITUTION WHEN CHALLENGING CONVICTIONS OR LENGTH OF THE SENTENCES TO SERVE.

The State's position and the Eleventh Circuit's decision are very candid in characterizing the obvious, that the PLRA is intended to discourage lawyers from taking inmates' cases. Congress certainly intended to discourage lawyers from taking inmate cases with respect to prison conditions, but Congress just as certainly did not limit inmates in attacking their underlying convictions or their sentences to serve. Since the PLRA was enacted to discourage attorneys from taking cases for prisoners for prison conditions, then following the State's argument it will discourage attorneys from taking cases attacking their underlying convictions or sentences by limiting their fees. If the same reasoning were continued to be followed, the "prison conditions umbrella" could go further to deny any fees at all to attorneys defending inmates, and ultimately deny inmates from any access to attorneys at all. Madison cautioned, "Temporary deviations from fundamental principles are more or less dangerous because once the deviation is made, it becomes the rule." If the PLRA is interpreted to allow limiting of attorney's fees in contesting underlying convictions and sentences to serve, then the

constitutional protections of right to counsel are on a slippery slope and falling.

Disparity of treatment limiting of attorney fees in meritorious civil rights cases involving the validity or length of sentences to serve in inmates' cases, would also be a restraint on inmates' Sixth Amendment right to counsel since it would discourage attorneys from accepting and pursuing cases for this unpopular and less powerful class. The United States Supreme Court has found it to be "beyond doubt that prisoners have a constitutional right to access to the courts" and held this right as "fundamental" that requires that prisoners receive "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 821, 825, 828 (1977). The United States Supreme Court also decreed that attorney's fees vindicating important civil rights should not be diminished. *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Lewis v. Casey*, 518 U.S. 343 (1996), following *Bounds*, continued to recognize inmates' right to access to an adequate law library to be able to contest their conviction or duration of their sentence. If the Sixth Amendment includes the right to access to an adequate prison library certainly the Sixth Amendment would stand for the basic right of inmates' unfettered and unrestricted ability to hire counsel to assist them in contesting their underlying conviction and sentence without being limited in reasonable attorney's fees necessary to vindicating their basic right to access to the courts.

The Eleventh Circuit Decision brushed off the obvious restraint of the PLRA to access to the courts and to the chilling effect on attorneys of the PLRA's limitations in even taking on their meritorious cases. The opinion held that the Petitioner would not have standing to raise the restraint on access to courts "as Jackson was represented by counsel and was successful in his §1983 action, he does not have standing to seek relief under the right of access to the courts." (Eleventh Circuit opinion, p. 13, Appendix A-11).

The opinion relied upon dicta in *Lewis v. Casey*, 518 U.S. 343, 353 (1996) which was not based on standing as Justice Scalia for the majority, *Id.* at 360-361, and Justice Stevens in his dissent, *Id.* at 396, both point out that the standing rule was not being applied when the majority concludes that systemic relief was simply "inappropriate here." On the contrary *Lewis v. Casey*, in the majority opinion, *Id.* at 354-355, and in the dissent, *Id.* at 403, instructs that attacks on sentences were viable under *Bounds*. As for standing to complain, the restraint of the PLRA on attorney's fees is the result of the District Court's order and the Court of Appeals decision that is here seeking this Writ of Certiorari. Very few incarcerated inmates would have an angel attorney interested and willing to take on such a complex and hard fought constitutional challenge without the prospect of reasonable attorney's fees if successful.

The practical rationales of the PLRA do not hold up when the underlying case involves not "prison conditions" but the very basic validity of the conviction or length of an inmate's sentence to serve. One of the rationales of the PLRA is to cut down on frivolous civil rights suits, but this is not a frivolous action as demonstrated by the underlying judgment of the District Court holding the Respondent Board's ninety percent to serve rule invalid and unconstitutional. The technical arguments that the PLRA somehow applies to this case which does not involve prison conditions pales in comparison to the serious constitutional issues that would be called in to play to discriminate against incarcerated inmates exercising basic and fundamental rights to contest their conviction or the length of the duration of their underlying sentence to serve. It was the unlawful conduct of the Respondent Board that the District Court found to have unconstitutionally extended Petitioner's duration of his sentence to serve and its precedent applied to 2,200 other similarly situated inmates who had been illegally incarcerated beyond their time for consideration for release on parole. It is submitted that when a governmental agency

kicks a hole in the United States Constitution, that meritorious Plaintiffs and their interested attorneys should not be penalized and limited for stepping on their foot.

VI. THE RESTRAINTS AND DISPARATE IMPACT OF THE PRISON LITIGATION REFORM ACT WOULD VIOLATE EQUAL PROTECTION IF APPLIED TO INCARCERATED DEFENDANTS AND NOT TO NON-INCARCERATED DEFENDANTS CHALLENGING THEIR CONVICTIONS OR SENTENCES TO SERVE

Are inmates less worthy to have competent and reasonably compensated attorneys represent them in vindicating their constitutional protections, seeking to overturn their conviction or justifiably seeking to shorten the length of their sentences to serve? The fundamental right of access to our courts must not discourage attorneys who take interest in their constitutional and civil rights plights and must not discriminate against incarcerated inmates who rightfully seek to contest their convictions or shorten the duration of their time to serve.

The Eleventh Circuit opinion quite correctly stated that, "the level of scrutiny is heightened, however, 'if a fundamental right or a suspect class is involved.'"(Eleventh Circuit opinion, p. 12, Appendix A-10). Then stated that prisoners are not a suspect class. Citing *Rivera v. Allin*, 144 F.3d 719, 727 (11th Cir. 2002). However, counsel for the Petitioner has not been able to find such a holding by the United States Supreme Court. It is submitted that prisoners are and should be a suspect class because they are among the least powerful in our society and often discriminated against beyond just their confinement. Certainly, the restrictions and limitations on attorney's fees of the PLRA do infringe upon fundamental rights of access to the courts and right to counsel when contesting underlying convictions or length of sentences to serve. Therefore, the constitutionality of the

PLRA restrictions and limitation on attorney's fees in cases involving collateral attacks on inmates' convictions or sentences to serve should be judged under heightened scrutiny.

The argument of the Respondent and the Court of Appeals' decision to apply the PLRA to the underlying case clearly would have a disparate impact on the inmate class of individuals seeking to exercise fundamental rights to contest their convictions or sentences. Petitioner Coleman Jackson is an indigent, African-American male. The dissent in *Walker v. Bain*, 257 F.3d 660, at 669 (6th Cir. 2001) points out that African-American males, although composing only six percent of the general population, account for almost half of the persons incarcerated in American prisons. Therefore, this disparity of treatment under the PLRA of inmates verses non-inmates amplifies the discrimination of incarcerated inmates on account of race which is impermissible under the Equal Protection Clause of the United States Constitution. This disparity of treatment goes to the very essence of what 42 U.S.C. § 1983 and other civil rights laws seek to protect. Applied in the instant case it discriminates in a most basic right to pursue judicial consideration of the duration of his sentence to serve.

To interpret the Prison Litigation Reform Act to apply to any actions contesting underlying convictions or length of sentences would run squarely into the equal protection guarantees of the United States Constitution. Given the fact that by its terms the PLRA applies to a suspect class, inmates that have disproportionate incarcerated minorities, and coupled with the State's argued restriction on the fundamental right to counsel and even access to the courts to contest convictions and length of sentences, this court should apply a heightened standard of review. The District Court's order found the PLRA "provisions rationally related to congressional goals of discouraging trivial prisoner lawsuits, conserving judicial resources, and protecting state

and federal treasuries." This Court should now review the constitutionality of the PLRA, not overlying past precedent in suits involving prison conditions, but in light of the clear restrain on the fundamental constitutional right to counsel to contest defendants' convictions or the length of the defendants' sentences to serve when applied to a suspect classification of a virtually powerless and stigmatized inmate class that is very disproportionately minority.

The case of *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), involved the suspect class of mentally retarded individuals. The Court's majority opinion as well as its several concurring and dissenting opinions agree that heightened judicial scrutiny is appropriate when a statute singles out a suspect classification or when laws impinge on personal rights protected by the Constitution. Both are present in the instant case. The PRLA when viewed through a demographic lens has a disparate impact on racial minorities and specifically targets the unpopular class of inmates which has often been treated with discrimination, hostility, and disfavor. The harm sought to be done to this to this class is to disenfranchise or severely limit their right to continue to appeal and collaterally attack their convictions and length of sentences to serve by limiting their ability to engage attorneys to aid them.

In *Cleburne* the Court struck down an ordinance even under a lesser judicial scrutiny which limited zoning for group homes for mentally disabled individuals. Under the Court's holding, can the PLRA stand to virtually deny and limit the constitutionally fundamental right to counsel in criminal cases, their direct appeals and collateral appeals? Will the holding of *Cleburne* permit a powerless class of disproportionate inclusion of minorities to be singled out for such harsh treatment? It is instructive that under either the standard of strict scrutiny or the lesser rationally related standard, the result was the same in *Cleburne* that the law could not be applied to discriminate against the mentally

retarded class to deny them housing opportunities. In this case the judicially heightened standard of strict scrutiny should be applied, but even under the rationally related standard, the PLRA cannot constitutionally be extended to cut off or limit the right of defendants to contest their convictions or underlying sentences to serve.

Arguments of convenience can always be made to undermine the sometimes inconvenient fundamental constitutional protections. These rationalizing arguments for the restrictive provisions of the Prison Litigation Reform Act are succinctly disposed of by Judge Daugherty in her dissenting opinion in *Walker v. Bain*, 257 F. 3d 660, 695 (6th Cir. 2001) that the PLRA:

- *reduces frivolous litigation*, but such frivolous filings are dismissed well before any calculation of attorneys fees and would not even be awarded unless the attorney prevailed ;
- *deters trivial or inconsequential litigation*, but meritorious constitutional vindication is not trivial and does not deter the majority of *pro se* actions filed by inmates;
- *reduces intervention of Federal courts into prison management*, but prisons as arms of state government and prison officials must remain subject to the rule of law and the United States Constitution and the courts are duty bound to rectify transgressions while restricting the remuneration of attorneys in no way limits the relief granted by a Federal court to remedy a constitutional violation;
- *prevents windfall fee awards for attorneys*, but the case law has developed

to arrive at appropriate attorneys fees awards under 42 U.S.C.§ 1988;

- *protects the public funds*, (and eliminating all attorneys fees would reach this goal more efficiently), but established attorney's fee guidelines adequately protects the public coffers and in Georgia such attorney's fee civil rights awards are paid by insurance pursuant to O.C.G.A. §§45-9-1 and 50-5-16;
- *limits disruption of prison litigation on prison operations*, but limiting attorney's fees does not limit prison officials from the over whelming number of *pro se* civil rights suits;
- *curbs prior abuses under § 1988*, but the established precedents as articulated by the United States Supreme Court gives adequate judicial oversight of attorney's fee awards.

Even the majority opinion in *Walker v. Bain, Id.* 676 recognized the PLRA "has a disparate impact on suspect classes and on individuals exercising fundamental rights" which have a "very high degree of disproportionality in the incarceration rates of incarcerated blacks compared to whites." The majority opinion even went further to point out their awareness that the attorney's fees restrictions of the PLRA "will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims" which " do in fact arise out of an actual proven civil rights violation." The dissenting opinion of Circuit Judge Daugherty after analyzing the lack of any reasonable relationship between the statutory provisions of the PLRA and the identified goals, concludes that even under rational relationship that the distinction drawn by the legislation between successful prisoner litigants and other successful civil rights litigants must be considered irrational." Citing

City of Cleburne Living Center, 473 U.S 432, 446. In light of the fact that the PLRA targets the suspect inmates subgroup that is disproportionably inclusive of minorities to restrict and even deny basic rights, strict scrutiny should be the standard rather than rational basis. However, even if rational basis were the standard as is demonstrated above the proffered rational basis given for the PLRA are illusory.

When the PLRA is attempted to be applied as in this case to even restrict contesting the underlying conviction or length of the sentence to serve offends basic constitutional protections that fundamentally cloak all other citizens. Its attempted application unquestionably has a substantial disparate impact on racial minorities as well as a totally discriminatory impact on incarcerated prisoners to restrict and practically deny them the right to contest their underlying convictions or length of their sentences to serve after they are incarcerated. If the congressionally enacted PLRA is allowed to limit and even practically deny inmates from obtaining counsel to assist them in contesting their convictions and sentences to serve, then some of the checks and balances of the United States Constitution will have been eroded, practical access to the courts limited, the guaranteed right to counsel vitiated, and equal protection of minorities and the unpopular class of inmates will be discriminated against by the anomaly of federal action which has long been looked to in upholding these sacred rights.

CONCLUSION

The Prison Litigation Reform Act does not apply to the underlying case which does not involve an action with respect to "prison conditions" and would violate the equal protection because of disparate treatment, access to the courts in violation of the Fifth Amendment and the right to counsel in violation of the Sixth Amendment if the limitations on attorney's fees of the PLRA were applied to restrain inmates challenging the underlying conviction or the length of their sentences or the constitutionality of the Georgia Board retroactively increasing the duration of their sentences in violation of the ex post facto prohibitions of the United States Constitution. These are important federal and constitutional question which have not been, but should be, decided by this Supreme Court of the United States.

Respectfully Submitted,

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No. _____

In The Supreme Court of the United States

COLEMAN JACKSON,

Petitioner,

v.

STATE BOARD OF PARDONS AND PAROLES, DEPARTMENT OF OFFENDER REHABILITATION, STATE OF GEORGIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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[PUBLISH]

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
MAY 20, 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15545

D.C. Docket No. 01-00068-CV-WC02

COLEMAN JACKSON,

Petitioner-Appellant-
Cross-Appellee,

versus

STATE BOARD OF PARDONS AND PAROLES,
DEPARTMENT OF OFFENDER REHABILITATION
OF THE STATE OF GEORGIA,

Respondents-Appellees-
Cross Appellants.

Appeals from the United States District Court for the
Northern District of Georgia

(May 20, 2003)

Before ANDERSON and WILSON, Circuit Judges, and OWENS*, District Judge.

WILSON, Circuit Judge:

Coleman Jackson appeals the district court's order granting in part and denying in part his motion for attorney's fees and his supplemental application for attorney's fees pursuant to 42 U.S.C. § 1988(b), and the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(d). Jackson contends that § 1997e(d) does not govern his motion for attorney's fees and his supplemental application for attorney's fees, because his 42 U.S.C. § 1983 action challenged the length of his confinement and not "prison conditions" within the meaning of § 1997e(a). Alternatively, he contends that § 1997e(d) violates his right to equal protection under the due process clause of the Fifth Amendment.[1] The State Board of Pardons and Paroles cross-appeals, contending that the court erroneously awarded Jackson fees-on-fees, or attorney's fees incurred in the course of litigating his petition for attorney's fees. These three arguments present issues of first impression in this Circuit. For the reasons set forth below, we affirm.

BACKGROUND

On August 4, 1999, Jackson was convicted of aggravated assault and sentenced to twenty years of

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* Honorable Wilbur D. Owens, Jr., United States District Judge for the Middle District of Georgia, sitting by designation.

[1] Although "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process." *United States v. Perez-Hernandez*, 672 F.2d 1380, 1385 (11th Cir. 1982) (per curiam) (internal quotation marks omitted). Therefore, "a classification [that] is invalid under the Equal Protection Clause of the Fourteenth Amendment . . . is also invalid under the Due Process Clause of the Fifth Amendment." *Id.* (internal quotation marks omitted).

imprisonment with five years to serve in prison and fifteen years of probation.[2] As of August 25, 1996, the date Jackson committed the assault, a prisoner convicted of aggravated assault was required to serve a minimum of one-third of his prison term before becoming eligible for a parole hearing before the board. *See* O.C.G.A. § 42-9-45(f). On December 9, 1997, however, the board amended its policy to provide that a prisoner convicted on or after January 1, 1998 of certain crimes, including aggravated assault, must serve a minimum of ninety percent of his term before becoming eligible for a parole hearing. The board applied its ninety-percent policy retroactively – that is, the board applied the new policy to all convictions entered on or after January 1, 1998 even if the underlying criminal conduct occurred before January 1, 1998. Thus, under the new policy, the board postponed the date of Jackson's initial parole eligibility hearing.

After his requests to reconsider his parole eligibility were denied twice by the board and once by Georgia's Superior Courts Sentence Review Panel, Jackson filed a joint motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a complaint for damages pursuant to § 1983. He alleged that by applying the new policy to his offense the board retroactively increased his punishment in violation of the Ex Post Facto Clause of the United States Constitution. The magistrate judge recommended that the district court dismiss his habeas corpus petition without prejudice for lack of exhaustion of administrative remedies, dismiss his claim for damages under § 1983, and permit his claim for equitable relief under § 1983 to proceed. Jackson subsequently filed objections to the report and recommendation and incorporated a motion for equitable judgment therein.

The district court adopted the magistrate judge's report and recommendation and, after conducting an

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[2] Jackson did not appeal his conviction and sentence.

evidentiary hearing, granted Jackson's motion for equitable judgment, permanently enjoined the board from enforcing the new policy against Jackson, and ordered the board to provide Jackson with an initial parole eligibility hearing within forty-five days of the order. As a result, the board held a hearing and subsequently notified the court that it granted Jackson parole.[3]

Thereafter, pursuant to § 1988(b), Jackson filed the instant motion for attorney's fees in the amount of $34,875 and costs in the amount of $335.21, for a total award of $35,210.21. The board objected to his motion and asserted that because Jackson filed a § 1983 claim "with respect to prison conditions," 42 U.S.C. § 1997e(a), the motion for attorney's fees and costs should be governed by § 1997e(d) of the PLRA.[4] Thereafter, Jackson filed a reply brief and a supplemental application for attorney's fees incurred while litigating the underlying motion in the amount of $2375.

The district court concluded that (1) § 1997e governed Jackson's underlying § 1983 claim and thus his motion for attorney's fees, because the underlying claim challenged "prison conditions" within the meaning of § 1997e(a); (2) § 1997e(d)'s fees restrictions do not violate the equal protection component of the Fifth Amendment; and (3) § 1997e(d) permits a prevailing plaintiff to recover fees-on-fees. Thus, pursuant to § 1988 and § 1997e(d), the court granted in part and denied in part Jackson's motion for attorney's fees and costs and his supplemental application for attorney's fees.[5] Jackson appeals the court's application

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[3] The board also announced its intent to review the parole eligibility of 2200 similarly situated prisoners throughout Georgia.

[4] The board raised the applicability of the PLRA to this litigation for the first time in its objection to Jackson's motion.

[5] Specifically, the court awarded Jackson attorney's fees in the amount of $9194.82, and costs in the amount of $113.96, for a total award of $9308.78.

of § 1997e(d) to his motion for attorney's fees and his supplemental application for attorney's fees,[6] and the board cross-appeals, challenging Jackson's supplemental attorney's fees award as impermissible fees- on-fees. *See id.* § 1997e(d)(1)(A) (prohibiting attorney's fees that are not "directly and reasonably incurred in proving an actual violation of the plaintiff's rights").

DISCUSSION

I. Applicability of § 1997e(d)[7]

Under § 1988(b), a district court may, in its discretion, award reasonable attorney's fees to a successful § 1983 plaintiff. *See id.* § 1988(b).[8] Accordingly, neither party disputes that, as a successful § 1983 plaintiff, Jackson may receive reasonable attorney's fees under § 1988. *See id.* The parties disagree, however, on the applicability of § 1997e(d) to Jackson's underlying § 1983 claim and thus his motion for attorney's fees. *See id.* § 1997e(d)(1) (restricting attorney's fees awards authorized under § 1988 "[i]n any action brought by a prisoner"). Jackson contends that § 1997e(d) is not applicable to his motion for attorney's fees, because his § 1983 action challenged the length of his confinement and not "prison conditions" within the meaning of § 1997e(a). The board alleges that because Jackson's § 1983 action was "brought by a prisoner," § 1997e(d) is applicable to his motion for attorney's fees.

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[6] Jackson does not appeal the district court's award of costs.

[7] "We review *de novo* issues of statutory interpretation." *United States v. Fischer*, 168 F.3d 1273, 1276 n.7 (11th Cir. 1999), *aff'd*, 529 U.S. 667 (2000).

[8] Section 1988(b) provides in relevant part that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

"We begin our construction of section 1997e[(d)] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision."[9] *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), *cert. denied*, 532 U.S. 1065 (2001). Section 1997e(d) provides,

> (1) In *any action brought by a prisoner* who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. §] 1988 . . ., such fees shall not be awarded, except to the extent that –
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 . . . and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

42 U.S.C. § 1997e(d)(1)(A)–(B) (footnotes omitted) (emphasis added). Here, we must determine the meaning of the phrase "any action brought by a prisoner" to decide whether § 1997e(d) applies to Jackson's underlying § 1983

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[9] As we frequently have stated, "[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (alterations in original) (internal quotation marks omitted). Moreover, "we must presume that Congress said what it meant and meant what it said." *Id.* (internal quotation marks omitted).

action and thus his motion for attorney's fees and his supplemental application for attorney's fees.

"In the absence of a statutory definition of a term, we look to the common usage of words for their meaning." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (internal quotation marks omitted). Often, courts look to dictionary definitions to ascertain the common usage of words. *Id.* at 1223. The dictionary definition of the word "action" is "a legal proceeding by which one seeks to have a wrong put right; lawsuit." *Webster's New World College Dictionary* 14 (Michael Agnes et al. eds., 4th ed. 1999); *see also Black's Law Dictionary* 28 (Bryan A. Garner et al. eds., 7th ed. 1999) (defining "action" as "[a] civil or criminal judicial proceeding").

Furthermore, Congress chose "an expansive modifier – the word 'any' – instead of a restrictive one." *CBS Inc.*, 245 F.3d at 1223; *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning . . . ."). We previously stated that "the adjective any is not ambiguous; it has a well-established meaning." *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1337 (11th Cir. 1999) (en banc) (internal quotation marks omitted). Therefore, without any language to limit the significance of this modifier, "any means all." *CBS Inc.*, 245 F.3d at 1223 (internal quotation marks omitted). Hence, the phrase "any action" covers a lawsuit challenging the length of an inmate's confinement.

Additionally, we have held that the term "brought," as used in subsections (a) and (e) of § 1997e, means filed. *See Harris*, 216 F.3d at 974 (interpreting the term "brought" as used in § 1997e(e)'s "[n]o federal civil action shall be brought" language to mean filed); *Miller v. Tanner*, 196 F.3d 1190, 1193 (11th Cir. 1999) (interpreting the term "brought" as used in § 1997e(a)'s "[n]o action shall be brought" language to mean filed). Normally, identical words that

appear in various parts of the same act are meant to have the same meaning. *See Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."). Thus, the term "brought" as used in § 1997e(d)'s "[i]n any action brought" language means filed. *See* 42 U.S.C. § 1997e(d)(1).

Finally, we need not resort to common usage to determine the meaning of the term "prisoner" in § 1997e(d), because Congress defined that term as it is used within § 1997e as follows: "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law." 42 U.S.C. § 1997e(h). As Jackson was convicted of aggravated assault and sentenced to twenty years of imprisonment, he is a prisoner within the meaning of § 1997e(h).

Therefore, it is apparent that § 1997e(d)'s phrase "any action brought by a prisoner" means all lawsuits that are filed by a prisoner and is not restricted to lawsuits challenging "prison conditions" that are filed by a prisoner. Accordingly, § 1997e(d) applies to Jackson's underlying § 1983 action and thus his motion for attorney's fees and his supplemental application for attorney's fees.[10]

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[10] The district court concluded that § 1997e(d) governed Jackson's underlying § 1983action and his motion for attorney's fees, because the underlying action challenged "prison conditions" within the meaning of § 1997e(a). Section 1997e(a) provides that "[n]o action shall be brought with respect to *prison conditions* under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). Although Congress included the term "prison conditions" in three of § 1997e's subsections, *see id.* § 1997e(a), (c)(1), (f)(1), it did not include that term in the remaining subsections, *see id.* § 1997e(d)(1), (e), (g), (h). Clearly, Congress knew how to specify "prison conditions" and purposefully chose where to do so and where not to do so. *See In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (en banc) (noting that "[w]here Congress knows how to say something but chooses not to, its

II. Equal Protection[11]

Jackson contends that § 1997e(d) violates his right to equal protection under the Fifth Amendment by restricting the attorney's fees awards of prisoners while permitting other litigants to recover full attorney's fees awards.[12] Although we previously have not addressed the constitutionality of § 1997e(d), several of our sister circuits have addressed this issue and found § 1997e(d) in its entirety, or its various subsections, constitutional. *See Foulk*

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silence is controlling" (alteration in original) (internal quotation marks omitted)). As Congress did not specify "prison conditions" in the subsection addressed in this appeal, § 1997e(d), we render no decision as to whether Jackson's § 1983 claim challenges "prison conditions" within the meaning of § 1997e(a). Nevertheless, we affirm the district court's judgment, because § 1997e(d) applies to all lawsuits that are filed by a prisoner. *See Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 n.1 (11th Cir. 1999) (per curiam) ("[W]e may affirm the district court's judgment on any ground that finds support in the record" (internal quotation marks omitted).).

[11] "We review the constitutionality of a federal statute *de novo*." *United States v. Jackson*, 111 F.3d 101, 101 (11th Cir. 1997) (per curiam).

[12] Section 1997e(d) provides,

> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.
>
> (4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988.

42 U.S.C. § 1997e(d)(2)–(4).

v. Charrier, 262 F.3d 687, 704 (8th Cir. 2001) (concluding that § 1997e(d)(2) survives rational basis review); *Walker v. Bain*, 257 F.3d 660, 670 (6th Cir. 2001) (concluding the same), *cert. denied*, 535 U.S. 1095 (2002); *Hadix v. Johnson*, 230 F.3d 840, 847 (6th Cir. 2000) (concluding that § 1997e(d)(3) survives rational basis review); *Boivin v. Black*, 225 F.3d 36, 46 (1st Cir. 2000) (concluding that § 1997e(d)(2) survives rational basis review); *Madrid v. Gomez*, 190 F.3d 990, 995–96 (9th Cir. 1999) (finding that § 1997e(d) passes constitutional muster). *But see Collins v. Montgomery County Bd. of Prison Inspectors*, 176 F.3d 679, 686 (3d Cir. 1999) (en banc) (declining to rule upon the constitutionality of § 1997e(d)(3) because the court was divided equally on the issue).[13] We conclude, like our sister circuits, that § 1997e(d) is constitutional.

Generally speaking, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate [governmental] interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The level of scrutiny is heightened, however, "[i]f a fundamental right or a suspect class is involved." *Gary v. City of Warner Robins*, 311 F.3d 1334, 1337 (11th Cir. 2002). As prisoners are not a suspect class, heightened scrutiny is not warranted on that basis. *Rivera v. Allin*, 144 F.3d 719, 727 (11th Cir. 1998). Jackson contends, however, that § 1997e(d)'s attorney's fees restrictions violate the fundamental right of access to the courts by discouraging attorneys from taking prisoners' civil rights cases.

Without question, "prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). To have standing to seek relief under this right,

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[13] While none of the courts of appeals that have addressed the constitutionality of § 1997e(d) have found it unconstitutional, one district court found § 1997e(d) unconstitutional. *See Johnson v. Daley*, 117 F. Supp. 2d 889, 893 (W.D. Wis. 2000) (finding no rational relationship between § 1997e(d)'s classification and the government's interests).

however, a plaintiff must show actual injury by "demonstrat[ing] that a nonfrivolous legal claim ha[s] been frustrated or . . . impeded." *Lewis v. Casey*, 518 U.S. 343, 353 (1996) (footnote omitted). As Jackson was represented by counsel and was successful in his § 1983 action, he does not have standing to seek relief under the right of access to the courts. *See Boivin*, 225 F.3d at 43 n.5 (noting that a prisoner who was represented by counsel and won his claim did not have standing to seek relief under the right of access to the courts). Thus, Jackson has not demonstrated a violation of a fundamental right, and, therefore, heightened scrutiny is not warranted on that basis.

As § 1997e(d) does not involve a suspect class nor infringe upon a fundamental right, we review its constitutionality under the rational basis test. *See Gary*, 311 F.3d at 1338. Under rational basis review, a classification within a statute "is accorded a strong presumption of validity," and we must uphold the statute "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319–20 (1993) (internal quotation marks omitted). The government is not required to provide evidentiary support for its classifications and may rely upon conjecture. *Hadix*, 230 F.3d at 843. Thus, Jackson bears the heavy burden of "negati[ng] every conceivable basis which might support [the statute], whether or not the basis has a foundation in the record." *Rodriguez ex rel. Rodriguez v. United States*, 169 F.3d 1342, 1350 (11th Cir. 1999) (internal quotation marks omitted).

Under this highly deferential standard, we conclude that § 1997e(d) survives rational basis review. Apparently, by enacting § 1997e(d), Congress intended to decrease "marginal or trivial lawsuits."[14] *Hadix*, 230 F.3d at 845; *see*

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[14] It is irrelevant that Congress did not specify its purpose in making the classification. *See Heller*, 509 U.S. at 320 ("[A] legislature that creates these categories need not actually articulate at any time the

also Walker, 257 F.3d at 668–69; *Boivin*, 225 F.3d at 45; *Madrid*, 190 F.3d at 996. Before the fee cap, there was nothing to dissuade attorneys from "adopt[ing] a 'shotgun' approach, filing numerous claims in the hopes that at least a minor violation would likely be found, [thus] assuring the recovery of attorneys fees." *Hadix*, 230 F.3d at 845. By lowering the fees recoverable for a successful claim, "a rational attorney [is likely to] demand a greater likelihood of success before taking a prisoner's case." *Id.*

Additionally, by decreasing frivolous claims, "Congress could also . . . be seeking to protect the state and federal treasuries, from which the majority of prisoner civil rights awards are paid." *Id.* In light of the "shotgun" approach many attorneys utilized before the fee cap, "Congress could have rationally concluded that [such] prisoner civil rights litigation leads to attorney fees which are often disproportionate to the harm or injury. Thus, by reducing the number of marginal, albeit meritorious claims, some government resources would be preserved." *Walker*, 257 F.3d at 669.

As Jackson has failed "to negat[e] every conceivable basis which might support" § 1997e(d), we must conclude that § 1997e(d) survives rational basis review. *Rodriguez*, 169 F.3d at 1350 (internal quotation marks omitted).[15]

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purpose or rationale supporting its classification" (internal quotation marks omitted).); *see also Boivin*, 225 F.3d at 44 n.6 (citing the legislative history of the PLRA as evidence of Congress's goals); *Harris*, 216 F.3d at 977 & n.5 (citing floor statements of the PLRA's principal architects to determine Congress's intent because the PLRA was enacted "as a rider to an appropriations bill" (internal quotation marks omitted)).

[15] Jackson also contends that § 1997e(d)'s application has a disparate impact on African American males, because they represent the majority of persons incarcerated in our prisons. As Jackson has not demonstrated any evidence of discriminatory intent, we find that this claim lacks merit. *See Parks v. City of Warner Robins*, 43 F.3d 609, 616

III. Fees-on-Fees[16]

On cross-appeal, the board contends that the district court erred in awarding Jackson fees-on-fees, because the fees-on-fees were not "directly and reasonably incurred in proving an actual violation" of Jackson's rights. 42 U.S.C. §1997e(d)(1)(A). Although we have not addressed whether § 1997e(d)(1) permits a prevailing § 1983 plaintiff to recover fees-on-fees, the Third and Fifth Circuits have concluded that fees-on-fees are recoverable under § 1997e(d)(1). *See Volk v. Gonzalez*, 262 F.3d 528, 536 (5th Cir. 2001); *Hernandez v. Kalinowski*, 146 F.3d 196, 200–01 (3d Cir. 1998). We agree.

Section 1988(b) permits reasonable attorney's fees "[i]n any action or proceeding to enforce a provision of section[] . . . 1983," 42 U.S.C. § 1988(b), and § 1997e(d)(1)(A) permits attorney's fees for "proving an actual violation of the plaintiff's rights," *id.* § 1997e(d)(1)(A). It is well-settled that fees-on-fees are permitted under § 1988 even though Congress did not explicitly provide for fees-on-fees therein. *Hernandez*, 146 F.3d at 200; *see also Jonas v. Stack*, 758 F.2d 567, 568 (11th Cir. 1985) ("[A] prevailing party's counsel is entitled to reasonable compensation when he litigates his own claim for entitlement to § 1988 fees."). As Congress has not "express[ed] an intent to change th[is] established construction," we will continue to follow that

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(11th Cir. 1995) (requiring "[p]roof of racially discriminatory intent or purpose . . . to show a violation of the Equal Protection Clause" (internal quotation marks omitted)). He further contends that § 1997e(d) violates his right to counsel under the Sixth Amendment. As this issue was not raised before the district court, we decline to address it on appeal. *See United States v. S. Fabricating Co.*, 764 F.2d 780, 781 (11th Cir. 1985) (per curiam) ("Generally, an appellate court will not consider a legal issue or theory raised for the first time on appeal.").

[16] "We review an award of attorney's fees by the district court only for an abuse of discretion." *Johnson v. Breeden*, 280 F.3d 1308, 1326 (11th Cir. 2002).

construction. *Volk*, 262 F.3d at 536 (internal quotation marks omitted).

Therefore, as § 1988(b)'s language permitting fees-on-fees does not differ significantly from § 1997e(d)(1)(A)'s language, we join our sister circuits in concluding that fees-on-fees are recoverable under § 1997e(d). *See id.*; *Hernandez*, 146 F.3d at 200–01.

CONCLUSION

Thus, we conclude that § 1997e(d) applies to Jackson's underlying § 1983 action and thus his motion for attorney's fees and his supplemental application for attorney's fees. Furthermore, we find that § 1997e(d)'s attorney's fees restrictions survive rational basis review. Finally, we conclude that fees-on-fees are recoverable under § 1997e(d)(1)(A). Accordingly, we AFFIRM.

FILED IN CLERK'S OFFICE
U.S.D.C. – Gainesville
SEP 10, 2002
LUTHER D. THOMAS, Clerk
By: /s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

COLEMAN JACKSON,	:	
	:	
Plaintiff,	:	
vs.	:	CIVIL NO.
	:	2:01-CV-068-WCO.
STATE BOARD OF PARDONS & PAROLES; DEPARTMENT OF OFFENDER REHABILITATION OF THE STATE OF GEORGIA,	:	
	:	
Defendant.	:	

ORDER

The captioned case is before the court for consideration of plaintiff's motion for attorney's fees and costs [18-1] and his supplemental application for attorney's fees [22-1], filed pursuant to the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 (2002).

At issue in this case is (1) whether a prisoner's constitutional challenge to a state parole board policy that

retroactively increases the amount of time he must serve in prison before becoming eligible for an initial parole hearing qualifies as an action by a prisoner "with respect to prison conditions" within the meaning of the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a) (2002), thus restricting the criteria for recoverable attorney's fees upon proof of a constitutional violation, see U.S.C. § 1997e(d) (2002); and, if so, (2) whether the imposition of said fee restrictions upon incarcerated § 1983 plaintiffs violates the equal protection component of the Fifth Amendment to the United States Constitution, see U.S. Const. amend. V; and (3) whether the attorney's fees provisions of the PLRA permit a victorious plaintiff to recover "fees-on-fees" – fees incurred in the course of litigating a petition for attorney's fees. All three appear to be issues of first impression in this circuit.

I. BACKGROUND

In a federal civil rights action predicated upon 42 U.S.C. § 1983, plaintiff successfully invalidated a parole eligibility policy implemented by the Georgia Board of Pardons & Paroles ("defendant") as unconstitutional ex post facto legislation. See U.S. Const. art. I, § 10, cl. 1. By order of May 30, 2002 [17-1], this court determined that (1) defendant had inflexibly enforced the challenged policy against plaintiff, giving it the full force and effect of law for ex post facto purposes; (2) plaintiff would likely have received an earlier parole date but for defendant's retroactive enforcement of the policy; and (3), therefore, the policy posed a sufficient risk of retroactively increasing the measure of punishment inflicted upon plaintiff by the State of Georgia [17-1]. As such, the court granted plaintiff's motion for declaratory and injunctive relief [7-1]; permanently enjoined defendant from enforcing the policy against plaintiff; and ordered defendant to reconsider plaintiff's parole eligibility, without regard to the invalidated policy, within 45 days of the issuance of the order.

Defendant thereafter issued a June 12, 2002 Notice of Action [19-1] indicating that, upon reconsideration, defendant voted to parole plaintiff and had initiated his release from custody. Additionally, although the court did not order defendant to do so, defendant publicly expressed its intent to review or reconsider the parole eligibility of approximately 2,200 similarly situated individuals incarcerated in prisons throughout the State of Georgia. See Rhonda Cook, Ruling May Give Inmates Another Chance at Parole, ATLANTA JOURNAL & CONST., June 7, 2002, at D4. Meanwhile, on June 10, 2002, plaintiff filed the instant motion for attorney's fees and costs pursuant to 42 U.S.C. § 191988[18-1], which authorizes the court, "in its discretion," to award prevailing § 1983 litigants "a reasonable attorney's fee as part of the costs . . ." 42 U.S.C. § 1988(b) (2002). After defendant filed objections to plaintiff's petition [21-1], plaintiff filed a reply brief [22-1], to which he attached a supplemental application for attorney's fees incurred in the course of litigating the underlying fee petition [Pl.'s Reply Br., Ex. B ("Supplemental Application for Attorney's Fees")].

In his initial motion, plaintiff requests attorney's fees in the amount of $34, 875.00 and costs in the amount of $335.21, for a total award of $35,210.21. Plaintiff's requested award, which includes seven hours researching and/or drafting the underlying motion for attorney's fees, is predicated upon a total of 139.5 hours, multiplied by an hourly rate of $250.00 per hour. His requested costs consist of (1) $206.25 in photocopying expenses; (2) a $5.00 "Filling [sic] Fee;" (3) $15.00 for "Certified Copies;" and (4) $108.96 in "Service Fees" [Pl.'s Mot. for Attorney's Fees, Ex. 1 ("Statement of Attorney's Fees & Costs") at 5]. Finally, plaintiff's Supplemental Application for Attorney's Fees seeks a total of $2,375.00, based upon 9.5 hours counsel spent reviewing defendant's objections to the fee petition and drafting a reply brief.

Defendant challenges plaintiff's fee petition on several grounds. First, defendant contends that plaintiff's motion for attorney's fees and costs is governed not by the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 (2002), which provides general authority to award attorney's fees in '[p]roceedings in vindication of civil rights," 42 U.S.C. § 1988(b) (2002), but by the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. § 1997e(a) (2002), which specifically governs all "action[s] . . . brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility . . ." 42 U.S.C. § 1997e(a) (2002). Accordingly, defendant argues that plaintiff's petition falls within the rubric of § 1997e(d), which sets forth a restrictive framework for recovering attorney's fees in PLRA cases. See 42 U.S.C. § 1997e(d) (2002). This distinction is critical, for the PLRA permits recovery only for fees "directly and reasonably incurred in providing an actual violation of the plaintiff's rights . . . [and] in enforcing the relief ordered." 42 U.S.C. §§ 1997e(d)(1)(A)-(B) (2002). Further, the PLRA limits the allowable "hourly rate [to no] greater than 150 percent of the hourly rate established under . . . [the Criminal Justice Act of 1964, 18 U.S.C. § 3006A] . . ." 42 U.S.C. § 1997e(d)(3) (2002).[1] Although § 3006A fails to provide clear

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[1] The relevant portion of 18 U.S.C. § 3006A provides:

(d) Payment for representation. --

(1) Hourly rate.--Any attorney appointed pursuant to this section . . . shall, at the conclusion of the representation . . . be compensated at a rate not exceeding $60 per hour for time expended in court . . . and $40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit . . .

18 U.S.C. § 3006A(d)(1) (2002). Nevertheless, the prevailing practices of the federal courts make it clear that Congress has failed to amend the

guidelines for determining appropriate hourly attorney rates, and Congress, the United States District Court for the Northern District of Georgia, and the Administrative Office of the United States Courts ("AO") have not promulgated sufficient guidelines for determining the same, annual transmittals to the federal judiciary from the AO indicate that the following base rates apply:

Effective Date	In-Court-Rate	Out-Of-Court Rate
January 1, 2000[2]	$70.00	$50.00
April 1, 2001[3]	$75.00	$55.00
May 1, 2002[4]	$90.00	$90.00

Accordingly, application of the PLRA's 150% threshold to

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statute to correspond with the implementation of annual rate increases. The federal judiciary's Guide to Judiciary Policies & Procedures and the relevant local rules of this court are likewise outdated. See LCr 44.1, NDGa, App. D, VII.C.1 ("Plan of the United States District Court for the Northern District of Georgia Pursuant to the Criminal Justice Act of 1964, as Amended") (providing for a maximum in-court rate of $60.00 , and a maximum out-of-court rate of $40.00); Administrative Office of the United States Courts, Guide to Judiciary Policies & Procedures, Vol. VII, Ch. II, part C, § 2.22(A) (2002) ("Compensation and Expenses of Appointed Counsel; Limitations; Hourly Rates") (same).

[2] Memorandum from Leonidas Ralph Mechum, Director, Administrative Office of the United States Courts, to all federal judges, clerks, court executives, and defender services (Dec. 28, 1999) (on file with the court) (also available at http://jnet.ao.dcn/library/memo/incr_122899.html).

[3] Memorandum from Leonidas Ralph Mechum, Director, Administrative Office of the United States Courts, to all federal judges, clerks, court executives, and defender services (Mar. 28, 2001) (on file with the court) (also available at http://jnet.ao.dcn/library/memo/dir1-025.pdf).

[4] Memorandum from Leonidas Ralph Mechum, Director, Administrative Office of the United States Courts, to all federal judges, clerks, court executives, and defender services (Mar. 22, 2002) (on file with the court) (also available at http://jnet.ao.dcn/library/memo/2002/dir2-038.pdf).

plaintiff's fee petition would reduce his maximum available hourly rate to:

For Work Performed	In-Court-Rate	Out-Of-Court Rate
on or after January 1, 2000	$105.00	$75.00
on or after April 1, 2001	$112.50	$82.50
on or after May 1, 2002	$135.00	$135.00

Additionally, defendant contends that (1) plaintiff cannot recover fees incurred in litigating related, but unsuccessful claims; (2) he cannot recover for fees incurred on related work completed prior to the preparation and filing of his § 1983 suit; (3) plaintiff's counsel inflated the amount of time in which he engaged in a telephone conversation with defendant's counsel, Devon Orland, on June 6, 2002 [Def.'s Obj. to Statement of Attorney's Fees & Costs ("Def.'s Obj."), Ex. A ¶ 5]; (4) counsel's fee request for preparing a one and a half-page letter on June 7, 2002 is excessive [Def.'s Obj., Ex. B]; (5) the PLRA prohibits recovering for time spent litigating a motion for attorney's fees, or "fees-on-fees;" and (6) plaintiff cannot recover for time counsel spent inappropriately contacting members of the defendant parole board without authorization from their attorney. Finally, defendant argues that plaintiff's bill of costs should be denied for failure to comply with the procedural requirements of 28 U.S.C. § 1920 and that, irrespective of the applicability of the PLRA, plaintiff's request for attorney's fees should be dramatically reduced and/or denied on grounds that his billing statement is excessive, vague, and includes unrecoverable overhead expenses.

II. DISCUSSION & ANALYSIS

A. Applicability of the PLRA to § 1983 Actions by Prisoners Attacking State Parole Eligibility Policies & Procedures

Section 1997e(a) of the PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2002). Plaintiff apparently having exhausted his available administrative remedies prior to the commencement of his underlying ex post facto suit, defendant has not previously raised the applicability of the PLRA at any point in this litigation. Rather, defendant raises the issue for the first time in response to plaintiff's motion for attorney's fees and costs. Defendant does not contend that plaintiff has failed to comply with the exhaustion requirements of § 1997e(a), only that the court must evaluate his fee petition within the rubric of § 1997e(d). As noted, that provision sets forth restrictions upon the recovery of attorney's fees "[i]n any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. § 1988]." 42 U.S.C. § 1997e(d) (2002).

It is undisputed that § 1988 empowers the court, in its discretion, to award attorney's fees in this case. The PLRA restricts what plaintiff is entitled to recover, however, if plaintiff's case qualifies as an action by a prisoner "with respect to prison conditions" within the meaning of § 1997e(a). 42 U.S.C. § 1997e(a) (2002). Yet, in drafting the exhaustion and fee provisions of the PLRA, Congress failed to define what it meant by "prison conditions." Further, neither the United States Court of Appeals for the Eleventh Circuit nor any other federal appeals court has had any occasion to review whether state-wide policies establishing

minimum time-served requirements for parole eligibility qualify as "prison conditions" under the PLRA.

Recently, the United States Supreme Court adopted an expansive definition of "prison conditions" under § 1997e(a), holding that "the PLRA[] . . . applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 122 S. Ct. 983, 992 (2002). The Supreme Court thus rejected the reasoning of the United States Court of Appeals for the Second Circuit, which had ruled that "prison conditions" pertain "only [to] conditions affecting prisoners generally, not single incidents, [which] . . . immediately affect only particular prisoners." Id. at 986. For various reasons, including the "unqualified heading" Congress bestowed upon § 1997e ("Suits by Prisoners"), the Supreme Court determined that Congress never "meant to bi-sect the universe of prisoner suits." Id. at 990.

More importantly, the Supreme Court observed that various courts have looked to the definitional section of a simultaneously enacted section of the PLRA for guidance. See id. at 987 n.2. That section, 18 U.S.C. § 3626, which sets forth a framework for obtaining prospective relief in prisoner cases, provides that "the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to [(1)] the conditions of confinement[;] or [(2)] the effects of actions by government officials on the lives of persons confined in prison . . ." 18 U.S.C. § 3626(g)(2) (2002). While the Supreme Court declined to "express [a] definitive opinion on the proper reading of § 3626(g)(2)," relying upon other grounds for its decision, the Court did not condemn or in any way criticize its use to clarify § 1997e. Id. at 988 n.3.

This point is critical, for the Eleventh Circuit has explicitly adopted the congressional definition of "prison

conditions" in § 3626(g)(2) to evaluate the applicability of § 1997e to prisoner lawsuits. See Johnson v. Breeden, 280 F.3d 1308, 1324-27 (11th Cir. 2002); Higginbottom v. Carter, 223 F.3d 1259, 1260-61 (11th Cir. 2000). See also Dillard v. Jones, 89 F. Supp. 2d 1362, 1365 (N.D. Ga. 2000) (Forrester, J.). Plaintiff's challenge thus qualifies as an action by a prisoner "with respect to prison conditions" within the meaning of §1997e(a) if it constitutes a federal civil action respecting either (1) "the conditions of confinement;" or (2) "the effects of actions by government officials on the lives of persons confined in prison . . ." 18 U.S.C. § 3626(g)(2) (2002). Prisoner suits attacking "prison conditions" typically involve allegedly inadequate medical care, nutrition, or facilities; excessive force or retaliation by guards; or inhibited access to legal resources, courts, or attorneys. See Mendoza v. Cowdrey, No. 00-CV-10500-BC, 2002 WL 253848 (E.D. Mich. Feb. 8, 2002) (court access, excessive force); Nunez v. Goord, 172 F. Supp.2d 417 (S.D.N.Y. 2001) (retaliation); Serrano v. Laboy, 169 F. Supp.2d 14 (D.P.R. 2001) (inadequate medical care); Jones v. Berge 172 F. Supp.2d 1128 (W.D. Wis. 2001) (inadequate dental and psychiatric care, transfer procedures, and overall conditions at "Supermax" facility); A.N.R. ex rel. Reed v. Caldwell, 111 F. Supp.2d 1294 (M.D. Ala. 2000) (quality/availability of institution's educational programs, activities, and opportunities); Veal v. Cooper, 936 F. Supp 511 (N.D. Ill. 1996) (access to prison law library). Nevertheless, state-wide parole eligibility policies establishing minimum time-served requirements for inmates clearly constitute "actions by government officials [affecting] the lives of persons confined in prison" within the meaning of § 3626(g)(2). 18 U.S.C. § 3626(g)(2) (2002); see also Salaam v. Consovoy, No. 99-CV-5692, 2000 WL 33679670, *4 (D.N.J. Apr. 14, 2000) (opining that prisoner's § 1983 action challenging New Jersey Parole Board's failure to provide him with an initial parole hearing, based upon alleged miscalculation of his parole eligibility date, constitutes an action "with respect to prison conditions" under § 3626(g)(2), thus implicating §

1997e). Accordingly, it is the opinion of this court that § 1997e governs plaintiff's § 1983 action and, thus, his motion for attorney's fees. Having so ruled, the court must now determine whether § 1997e(d), the PLRA subsection governing attorney's fees, offends the equal protection component of the Fifth Amendment to the United States Constitution by restricting prisoners' recovery of attorney's fees to a greater extent than non-incarcerated § 1983 litigants.

B. Constitutionality of § 1997e(d) Under the Fifth Amendment

In his reply brief attacking defendant's objections to his initial fee petition, plaintiff argues that even if Congress intended for the PLRA to extend to plaintiff's action, "[i]t would be absurdly inconsistent and probably unconstitutional under the Equal Protection Clause to permit full attorney's fees awards under 42 U.S.C. Section 1988 to a successful plaintiff who was not incarcerated . . . but limiting the attorney's fees award involving a successful plaintiff who was unfortunately incarcerated." [Pl.'s Reply Br. at 3]. Given that the application of the PLRA implicates federal, rather than state, action, plaintiff's equal protection challenge is more properly evaluated under the Due Process Clause of the Fifth Amendment, which has been construed to include an equal protection component, see Bolling v. Sharpe, 347 U.S. 497, 499 (1954), rather than the "Equal Protection Clause," which is part of the Fourteenth Amendment [Pl.'s Reply Br. at 3]. See U.S. Const. amend. V (applicable to the federal government); U.S. Const. amend XIV, § 1 (applicable to the states).

Although the Eleventh Circuit has apparently not yet had the occasion to review the constitutionality of § 1997e(d) under the equal protection component of the Fifth Amendment, the federal courts have almost unanimously rejected such challenges. See Walker v. Bain, 257 F.3d 660,

669 (6th Cir. 2001) (opining that § 1997e(d)(2) survives equal protection scrutiny); Boivin v. Black, 225 F.3d 36, 46 (1st Cir. 2000) (same); Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000) (opining that § 1997e(d)(3) survives equal protection scrutiny); Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir. 1999) (upholding § 1997e(d)(2)); Carbonnell v. Acrish, 154 F. Supp. 2d 552, 564 (S.D.N.Y. 2001) (same); Morrison v. Davis, 88 F. Supp.2d 799, 803-13 (S.D. Ohio 2000) (same). But see Collins Montgomery County Bd. of Prison Inspectors, 176 F.3d 679, 686 (3d Cir. 1999) (en banc), cert. denied, 528 U.S. 1115 (2000) (declining to rule upon constitutionality of § 1997e(d)(3) because the en banc court divided equally on the question); Johnson v. Daley, 117 F. Supp.2d 889, 893 (W.D. Wis. 2000) (invalidating § 1997e(d) on equal protection grounds). This court is in agreement with those decisions. The PLRA fee restrictions neither target a suspect class nor infringe upon a fundamental constitutional right so as to trigger heightened constitutional scrutiny. Rather, the challenged provisions are rationally related to the congressional goals of discouraging trivial prisoner lawsuits, conserving judicial resources, and protecting state and federal treasuries. See Haddix, 230 F.3d at 845 (6th Cir. 2000).

Several Eleventh Circuit rulings provide further support for this position. On similar grounds the Eleventh Circuit has uniformly rejected equal protection challenges to various unrelated provisions of the PLRA. See, e.g., Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (observing that three-strikes provision of in forma pauperis statute, 28 U.S.C. § 1915(g) (2002), does not violate prisoners' equal protection rights); Vanderberg v. Donaldson, 259 F.3d 1321, 1324 (11th Cir. 2001) (opining that dismissal standard set forth in § 1915(e)(2)(B)(ii) of in forma pauperis statute survives equal protection scrutiny); Loyd v. Alabama Dep't of Corr., 176 F.3d 1336, 1343 (11th Cir. 1999) (observing that termination provision of PLRA's prospective remedies statute, 18 U.S.C. § 3626(b)(2) (2002), does not offend the

Fifth Amendment). Accordingly, this court rejects plaintiff's Fifth Amendment challenge to the fee restrictions set forth under § 1997e(d).

C. Recovery of "Fees-On-Fees" by Prevailing PLRA Plaintiffs

Having determined that the PLRA fee provisions apply to plaintiff's motion for attorney's fees, and that the application of said fee provisions to § 1983 suits filed by prisoners survives equal protection scrutiny, the court need only evaluate whether a prevailing plaintiff may recover "fees-on-fees" under §1997e(d) before examining the merits of plaintiff's underlying fee petition. Again, the Eleventh Circuit does not yet appear to have resolved this issue.

Since the text of 1997e(d) does not explicitly address whether "fees-on-fees" are recoverable, § 1988 serves as a logical starting point. This is because § 1997e(d) specifically applies to the recovery of "attorney's fees [otherwise] authorized under section 1988 . . ." 42 U.S.C. § 1997e(d)(1) (2002). Thus, if "fees-on-fees" are not otherwise recoverable under § 1988, then courts certainly cannot award them pursuant to § 1997e(d). Under the law of the Eleventh Circuit, however, it is well settled that prevailing parties are entitled to reasonable compensation for litigating their entitlement to attorney's fees under § 1988. See Villano v. City of Boynton Beach, 254 F.3d 1302, 1309 (11th Cir. 2001); Jonas v. Stack, 758 F2d. 567, 568 (11th Cir. 1985).

Further, the United States Courts of Appeals for the Fifth Circuit and the Third Circuit, the only federal appellate courts to have examined this issue in the context of the PLRA, have ruled that § 1997e(d) does in fact permit prevailing parties to recover reasonable fees incurred in the course of litigating their entitlement to attorney's fees. See Volk v. Gonzalez, 262 F.3d 528, 536 (5th Cir. 2001) (holding that "fees-on-fees are 'directly and reasonably incurred in

proving an actual violation of the plaintiff's rights' and therefore recoverable under § 1997e(d)."); Hernandez v. Kalinowski, 146 F.3d 196, 200-01 (3d Cir. 1998) (opining that, "to prevent a defendant from effectively eroding the amount a plaintiff and his or her attorney ultimately collect, and to minimize unnecessary and frivolous litigation that may arise over fee awards . . . the PLRA must be interpreted to include 'fees on fees.'"). See also Campbell v. Illinois Dep't of Corr., No. 92-C-3265, 2001 WL 289783, *1 (N.D. Ill. Mar. 15, 2001), vacated on other grounds, Campbell v. Groves, Nos. 01-1426, 01-1851, 13 Fed. Appx. 433 (7th Cir. July 10, 2001) (same); West v. Manson, 163 F. Supp.2d 116, 121 (D. Conn. 2001) (same); Wolff v. Moore, 104 F. Supp.2d 892, 905 (S.D. Ohio 2000), rev'd on other grounds, Nos. 00-3959, 00-3995, 234 F.3d 1271, 2000 WL 1679503 (6th Cir. Nov. 3, 2000) (same). Given this authority, it is the opinion of this court that § 1997e(d) does not preclude a prevailing § 1983 plaintiff from recovering reasonable "fees-on-fees."

D. Plaintiff's Motion for Attorney's Fees

1. Compensable Time Under § 1997e(d)

Given that the court has determined that plaintiff's fee petition is governed by § 1997e(d) of the PLRA and that plaintiff may recover reasonable "fees-on-fees," the court will now evaluate plaintiff's Statement of Attorney's Fees & Costs and his Supplemental Application for Attorney's Fees within that framework. Section 1997e(d)(1) provides, in relevant part:

> In any action by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [§]1988 . . . such fees shall not be awarded, except to the extent that –
>
> (A) the fee was directly and

> reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [§]1988 of this title; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

42 U.S.C. § 1997e(d)(1) (2002). Additionally, as noted earlier, the statute caps the maximum hourly attorney rate upon which the prevailing plaintiff's award may be based at 150% of the established § 3006A rate and prevailing plaintiffs cannot recover fees not "[otherwise] authorized under [§] 1988[(b)] . . ." 42 U.S.C. §§ 1997e(d)(3), (d)(1) (2002). Accordingly, § 1988(b) is a helpful starting point in evaluating plaintiff's fee requests.

As defendant correctly asserts in its objections to plaintiff's motion for attorney's fees, excessive fee requests may be summarily denied, see In Re Chicken Antitrust Litigation, 560 F. Supp. 963 (N.D. Ga. 1980) (O'Kelley, J.); prevailing parties cannot recover for fees incurred while pursuing related, but unsuccessful claims that were clearly without merit, see Popham v. City of Kennesaw, 820 F.2d 1570, 1579 (11th Cir. 1987); and reasonable travel time, although ordinarily compensable at the attorney's basic hourly rate, see Mallory v. Harkness, 923 F. Supp. 1546, 1556-57 (S.D. Fla. 1996), aff'd, 109 F.3d 771 (11th Cir. 1997), may be compensated at a "reduced [rate] if no legal work was performed during travel." Lambert v. Fulton County, GA, 151 F. Supp.2d 1364, 1370 (N.D. Ga. 2000) (Thrash, J.), aff'd, 253 F.3d 588 (11th Cir. 2001). Finally, "[t]he party seeking the fees has the burden of submitting evidence in support of the hours and rates claimed . . ." Mills v. Freeman, 118 F.3d 727, 733 (11th Cir. 1997). See

also L.R. 54.2A(2), NDGa. (providing that a party seeking attorney's fees must "serve a detailed specification and itemization of the requested award, with appropriate affidavits and other supporting documentation."). This burden is particularly important where, as in this case, the fee applicant has experienced only partial success on his claims. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); ACLU of Ga. v. Barnes, 168 F.3d 423, 427 (11th Cir. 1999).

On the other hand, contrary to defendant's position § 1988(b) permits the recovery of attorney's fees accrued in connection with mandatory administrative proceedings preceding the relevant § 1983 litigation, see North Carolina Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 15 (1986), as well as for reasonable post-judgment advocacy. See Adams v. Mathis, 752 F.2d 553, 554 (11th Cir. 1985).

As a preliminary matter, therefore, plaintiff's motion for attorney's fees and costs is hereby **DENIED** with respect to fees incurred in the course of litigating (1) plaintiff's unsuccessful federal habeas petition, which clearly lacked merit given plaintiff's failure to exhaust his available state remedies; and (2) plaintiff's unsuccessful claim for money damages under § 1983, which was clearly barred by Georgia's Eleventh Amendment immunity. In light of plaintiff's failure to plead his relevant time expenditures with "sufficient particularity so that the district court can assess the time claimed for each activity," ACLU of Ga. v. Barnes, 168 F.3d at 427, and given his partial success, the court will reduce[5] said time expenditures as follows:

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[5] The Eleventh Circuit has opined that courts should take care not to exclude an entire time entry as vague, redundant, or excessive; they should instead attempt to apportion each entry or activity in a balanced manner. See Duckworth v. Whisenant, 97 F.3d 1393, 1397 n.4 (11th Cir. 1996) (adopting order of Judge J. Owen Forrester as the order of the court).

Date	Matter	Plaintiff's Request	Court's Award
4/18/01	"Continued research and rough draft of Complaint and Habeas Corpus Petition"	6.5	3.5
4/19/01	"Worked on Complaint and Petition, continued research into procedural issues and constitutional issues"	5.0	2.5
4/21/01	"Drafted Mandatory Disclosures and redrafted Petition"	4.5	3.0
4/22/01	"Final review and filed Petition and Complaint"	1.5	0.5
6/23/01	"review of Motion to Dismiss for Lack of Exhaustion, research at Stokes and Murphy into issues raised"	5.0	0.0
6/24/01	"Preliminary draft of response"	4.0	0.0
6/27/01	"Additional research at Stokes and Murphy and finalized response which was filed by mail"	6.5	0.0
11/28/01	"Review of Report and Recommendation of Magistrate and research into issues raised at Stokes and Murphy"	4.5	0.0
11/29/01	"Drafted Objections to Report and Recommendations [sic]of Magistrate, and drafted motion for	8.0	1.0

	Equitable Order, Research at Stokes and Murphy into exhaustion issues specific to Georgia parole procedure when Georgia courts lose jurisdiction"		
3/13/02	"Extensive research into U.S. Supreme Court cases which would be considered controlling on exhaustion and 1983 cases involving parole action, read and printed every possible case for hearing, outlined cross examination of Steve Baustin and listed elements to be proven at hearing, trip to Stokes and Murphy for research"	5.0	4.5
3/27/02	"Review of State of Georgia Answer and defenses to complaint to add individual members of Parole Board in light of 11th Amendment immunity of State, states conference with Coleman Jackson"	1.6	0.6

Further, given plaintiff's failure to meet his burden of showing that he conducted legal work during the travel time he has submitted, see Lambert v. Fulton County, GA, 151 F. Supp.2 at 1370, or to make any effort to differentiate between said travel time and overall legal work, the court

will apply a 50% reduction[6] to the hourly out-of-court rate respecting the following time entries:

Date	Matter	Compensable Time	Time Subject to Reduced Rate[7]
4/26/01	"Telephone conference with clerk and reply to clerk's return of filings and trip to Post Office for money order, refilled[sic] Complaint and Petition"	1.0	0.2

[6] In this circuit and elsewhere, federal courts typically cap compensation for travel time at 50% of the attorney's reasonable hourly rate. See, e.g., Dunten v. Kibler, 518 F. Supp. 1146, 1152 (N.D. Ga. 1981) (Edenfield, J.); Burke By & Through Burke v. Keenum, No. 288-067, 1989 WL 14681, *9 (S.D. Ga. Feb. 21, 1989) (Alaimo, C.J.); United States v. Marengo County Comm'n, 667 F. Supp. 786, 797-98 (S.D. Ala. 1987) (Hand, C.J.); Gonzalez v. Bratton, 147 F. Supp.2d 180, 213 n.6 (S.D.N.Y. 2001); Zaffutp v. City of Hammond, No. 00-941, 2001 WL 1020355, *7 (E.D. La. Sept. 4, 2001). But see Burks v. P.O. E. Harris, No. 90-C-728, 1991 WL 169379, *3 (N.D. Ill. Aug. 28, 1991) (opining that, given opportunity costs, attorney's travel time should be compensated at 100% of regular hourly rate).

[7] Using counsel's law office at 1040 Peachtree Battle Avenue, Atlanta, Georgia 30327, as the point of origin, the court calculated reasonable travel times by mapping the distance from counsel's law office to (1) the nearest United States Post Office, 1984 Howell Mill Rd., Atlanta, Georgia 30327 (distance: 1.5 miles; estimated time: 6 minutes); (2) the nearest Kinko's, 3401 Northside Parkway N.W., Atlanta, Georgia 30327 (distance 2.36 miles; estimated time: 7 minutes); and (3) the federal courthouse in Gainesville, Georgia (distance: 54.67 miles; estimated time: 1 hour, 4 minutes). See MapQuest.Com, North America, Driving Directions (http://www.mapquest.com/directions/main.adp) (visited on July 11, 2002).

4/5/02	"Detailed review of statistics and other documents produced, preliminary outline of proof at hearing, trip to Kinkos for copying of Exhibits, reread all relevant cases, research into new defense that the policy resolution was not an official regulation"	3.0	0.25
4/8/02	"Finalized Reply Brief and drafted Petitioner's Exhibit Designation, meeting with Coleman Jackson's friend, Carolyn Moore and brother, Preston Jackson, to get additional documents for hearing, trip to Kinkos for copying and FedEx service copies to State Attorney General"	3.5	0.25
4/9/02	"Final outline of argument and final review of	4.0	0.25

	cases and exhibits, additional trip to Kinkos for more copies"		
4/10/02	"Trip to Gainesville for hearing, Telephone conferences with Coleman Jackson and his family about hearing"	6.0	2.0
6/5/02	"Trip to Gainesville to obtain certified copy of Judge's Order"	2.0	1.8

Having carefully reviewed plaintiff's Statement of Attorney's Fees & Costs and his Supplementary Application for Attorney's Fees, the applicable law, and defendant's briefs, the court finds defendant's remaining objections to be without merit. First, plaintiff's fee requests for June 6, 2002 and June 7, 2002 indicate that counsel engaged in several compensable tasks during each time period; defendant cannot show that plaintiff inflated the time he spent drafting a particular letter or engaged in a telephone conversation with defendant's counsel [Def.'s Obj. at 7]. Second, although plaintiff's fee petition fails to properly delineate in-court time and out-of-court time, the court's April 2002 Trials Activity Report reflects that the only hearing in connection with this matter lasted for three hours on April 10, 2002 [Administrative Office of the U.S. Courts Statistical Division Form JS-10, Monthly Report of Trials and Other Court Activity, Apr. 2002]. Accordingly, plaintiff is entitled to recover for 3.0 hours of in-court time at the applicable hourly rate.

Finally, the court finds plaintiff's remaining time expenditures reasonable under both § 1988(b) and § 1997e(d), said time having been "directly and reasonably incurred in proving an actual violation of the plaintiff's rights," and "in enforcing the relief ordered for the violation." 42 U.S.C. § 1997e(d) (2002). As earlier noted, this includes counsel's "fees-on-fees"; the time counsel spent litigating plaintiff's mandatory administrative remedies, see Wolff v. Moore, 104 F. Supp.2d 892, 904 (S.D. Ohio 2000), rev'd on other grounds, Nos. 00-3959, 00-3995, 234 F.3d 1271 (6th Cir. Nov. 3, 2000) (concluding that fees incurred in connection with post-judgment administrative-exhaustion litigation are compensable under § 1997e(d)(1) because exhaustion is tantamount to "plaintiff's right to bring suit in the first instance"); and reasonable post-judgment advocacy. See Weaver v. Clarke, 933 F. Supp. 831, 836 (D. Neb. 1996), aff'd, 120 F.3d 852 (8th Cir. 1997) (opining that § 1997e(d)(1) permits recovery of fees incurred while enforcing the judgment and remedying the ongoing constitutional violation).

2. Applicable Hourly Rate Under § 1997e(d)(3)

Unlike § 1988(b), which permits courts to determine a reasonable hourly rate based upon "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation," Norman v. Housing Auth., 836 F.2d 1292, 1299 (11th Cir. 1988), § 1997e(d)(3) simply caps the allowable rate at 150% of the rate awarded to court-appointed counsel under 18 U.S.C. § 3006A without "differentiating between . . . attorneys . . . of varying experience levels . . ." Roberson v. Brassell, 29 F. Supp.2d 346, 353 (S.D. Tex. 1998). By his own admission, plaintiff's counsel had never litigated a § 1983 case prior to this one.

Nevertheless, the maximum PLRA rates are already quite low in comparison to (1) hourly rates awarded in other Gainesville Division cases, see, Patterson v. Barnhart, No. 2:01-CV-037-WCO (N.D. Ga. Feb. 7, 2002) (O'Kelley, J.) (order granting motion for attorney's fees) (establishing $120.00 per hour as the prevailing market rate for social security cases in the Gainesville Division); Trammell v. City of Cleveland, Georgia, No. 2:00-CV-192-WCO (N.D. Ga. Apr. 9, 2001) (O'Kelley, J.) (order granting motion for attorney's fees) (establishing $95.00 to $150.00 per hour as the prevailing market rate for constitutional cases in the Gainesville Division, depending upon counsel's experience); and (2) plaintiff's requested hourly rate of $250.00. Therefore, with the exception of the above-referenced travel time, the court will permit plaintiff to recover his attorney's fees using the applicable maximum rate under § 1997e(d)(3). Though the court is reluctant to confer such an award in this case, the court is equally wary of discouraging attorneys throughout the Northern District of Georgia from taking cases aimed at vindicating the federal constitutional rights of prisoners.

3. Plaintiff's Award of Attorney's Fees

In view of the exclusions and reductions discussed herein, plaintiff's time expenditures are compensable as follows:

For Work Performed	Hours	Hourly Rate	Award
on or after Jan. 1, 2000	13.4	$75.00 (out-of-court)	$1,005.00
on or after Apr. 1, 2001	62.45	$82.50 (out-of-court)	$5,152.13
	3.0	$112.50 (in-court)	$337.50
	2.95	$41.25	$121.69

		(travel)	
on or after May 1, 2002	18.2	$135.00 (out-of-court)	$2,457.00
	1.8	$67.50 (travel)	$121.50
		TOTAL AWARD -	$9,194.82

Accordingly, plaintiff's motion for attorney's fees and supplementary application for attorney's fees are hereby **GRANTED** in the amount of $9,194.82 [18-1; 22-1].

E. Plaintiff's Bill of Costs

Pursuant to 28 U.S.C. § 1920, a federal court may tax as costs certain litigation expenses such as court filing fees, witness fees, and necessary transcription and photocopying costs. See 28 U.S.C. § 1920 (2002). Further, Rule 54(d)(1) of the Federal Rules of Civil Procedure provides that, "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . ." Fed. R. Civ. P. 54(d)(1). Defendant contends that plaintiff's bill of costs should be denied for failure to comply with the procedural requirements of 28 U.S.C. § 1920.

Under the law of the Eleventh Circuit, however, neither § 1920 nor Rule 54(d)(1) apply to the taxation of costs under § 1988(b); "[t]he issue of which expenses are properly chargeable to the defendants under section 1988 is not settled by reference to any pre-determined list of items . . ." Dowdell v. City of Apopka, Florida, 698 F.2d 1181, 1189 (11th Cir. 1983). Rather, "with the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the

course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988." Id. at 1192 (emphasis added).

As noted earlier, plaintiff's requested costs consist of (1) a $5.00 "Filling [sic] Fee;" (2) $15.00 for "Certified Copies;" (3) $108.96 in "Service Fees;" and (4) $206.25 for "Copies of pleadings and Exhibits . . . 825 @ $.25" [Statement of Attorney's Fees & Costs]. Clearly, filing fees ($5.00) and fees for service ($108.96) are recoverable in a motion to tax costs. Plaintiff's motion to tax costs is therefore **GRANTED** in the amount of $113.96 [18-1]. With respect to plaintiff's copying expenses, however, the cases suggest that even under § 1988(b), the movant bears the burden of showing that his copies were reasonably necessary. See Jan R. Smith Constr. Co. v. DeKalb County, 18 F. Supp.2d 1365, 1377-78 (N.D. Ga. 1998) (Moye, J.); Daugherty v. The Westminster Schools, Inc., 174 F.R.D. 118, 124 (N.D. Ga. 1997) (Carnes, J.); Miller v. Kenworth of Dothan, Inc., 117 F. Supp.2d 1247, 1265 (M.D. Ala. 2000). See also DiCecco v. Dillard House, Inc., 149 F.R.D. 239, 243 (N.D. Ga. 1993) (O'Kelley, J.).

Although counsel's Statement of Attorney's Fees & Costs indicates that he traveled to the federal courthouse in Gainesville on June 5, 2002, to obtain a "certified copy of Judge's Order," plaintiff's bill of costs fails to indicate why such certification was reasonably necessary or what other document or documents were certified [Statement of Attorney's Fees & Costs at 4].[8] Accordingly, plaintiff has failed to meet his burden with respect to this expense. Likewise, plaintiff has failed to meet his burden of showing

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[8] Given that the Northern District of Georgia currently charges a fee of $7.00 to "[c]ertify any document or paper," counsel's $15.00 request suggests that he obtained certification for multiple documents or copies thereof. United States District Court for the Northern District of Georgia, General Information, Court Fees (http://www.gand.uscourts.gov/courtfees.htm) (visited on July 16, 2002).

that his photocopying expenses were reasonably necessary. Counsel requests $206.25 for "[c]opies of pleadings and [e]xhibits," identifying the number of pages copied (825) and the per-page photocopying rate (25 cents), yet he fails to provide any explanation or itemization of said expenses. At a minimum, counsel should have indicated "when these expenses were incurred, for which of the two cases they were incurred, or for which motion [, pleading, or exhibit] they were incurred." Jan R. Smith Constr. Co., 18 F. Supp.2d at 1377. Neither the overall volume of pleadings in this case nor the volume of exhibits introduced into evidence by plaintiff at the April 10, 2002 hearing is so great as to automatically justify the copying of over eight hundred pages of material.

III. CONCLUSION

For the reasons set forth above, plaintiff's motion for attorney's fees and costs [18-1] and plaintiff's supplemental application for attorney's fees [22-1] are hereby **GRANTED** in part and **DENIED** in part. Pursuant to 42 U.S.C. § 1988(b) and 42 U.S.C. § 1997e(d), plaintiff's request for attorney's fees is hereby **GRANTED** in the amount of **$9,194.82**. Further, plaintiff's motion to tax costs is hereby **GRANTED** in the amount of $113.96 [18-1]. The Clerk is **DIRECTED** to enter a supplemental judgment in favor of plaintiff and against the defendant State Board of Pardons & Paroles in the amount of **$9,308.78** and for post-judgment interest at the legal rate from May 30, 2002 (the original judgment date). See Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 794, 799 (11th Cir. 1988).

IT IS SO ORDERED, this 10th day of September, 2002.

s/ *William C. O'Kelley*
William C. O'Kelley
Senior United States District Judge

FILED IN CLERK'S OFFICE
U.S.D.C. – Gainesville
MAY 30, 2002
LUTHER D. THOMAS, Clerk
By: /s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

COLEMAN JACKSON,	:	
	:	
Plaintiff,	:	
vs.	:	CIVIL NO.
	:	2:01-CV-068-WCO.
STATE BOARD OF PARDONS &	:	
PAROLES; DEPARTMENT OF	:	
OFFENDER REHABILITATION	:	
OF THE STATE OF GEORGIA,	:	
	:	
Defendant.	:	

ORDER

The captioned case is before the court for consideration of plaintiff's motion for equitable judgment [7-1].

I. Background

Plaintiff is currently confined at the Hall County Correctional Institute pursuant to an August 4, 1999 conviction for aggravated assault in the Superior Court of

Fulton County, Georgia. See State v. Jackson, No. Z85142 (Ga.Super. Ct. filed Dec. 20, 1996). Based upon a grand jury indictment charging him with "unlawfully commit[ting] an assault upon the person of Shirley Ann Welch, by shooting at, toward, and in her direction with a pistol, and by striking and beating her with a pistol," the court sentenced plaintiff to confinement for a period of twenty years, with five years to serve (Pl.'s Ex. 5 at 33; Def.'s Ex. 4 at 2).[1] Plaintiff did not appeal his conviction or sentence.

As of August 25, 1996, the date of plaintiff's offense, the Georgia General Assembly required prisoners convicted of aggravated assault to serve a minimum of "one-third of the prison term imposed by the sentencing court" before becoming eligible for an initial parole hearing before the State Board of Pardons & Paroles ("the Board"). O.C.G.A. § 42-9-45(f) (2002). Nevertheless, on December 9, 1997, the Board adopted a resolution amending its statutory guidelines "to provide that any offender who is convicted on or after January 1, 1998, of one or more of [twenty enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison" (Pl.'s Ex. 1 at 1; Def.'s Ex. 2 at 2 ("90% time-served policy")). The Board's new 90% time-served policy thus increased the minimum number of months-to-serve for certain offenses, including plaintiff's, postponing the date of the earliest possible parole eligibility hearing until service of 90%, rather than one-third, of the inmate's prison sentence. Further, the Board applied its new policy retroactively; the policy applied to all covered convictions entered on or after January 1, 1998 even though, in many cases, the underlying criminal conduct had taken place prior to that date.

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[1] Unless otherwise indicated, "Ex." refers to exhibits admitted at the evidentiary hearing held in connection with this matter on April 10, 2002.

On October 2, 2000, the Board informed plaintiff that his recommended tentative parole month ("TPM"), the date upon which he would tentatively be entitled to his first parole eligibility hearing, had been scheduled for June of 2003 (Pl.'s Ex. 5 at 18; Def .'s Ex. 5). Plaintiff challenged his TPM by letter of October 24, 2000, requesting that the Board re-evaluate his parole eligibility (Pl.'s Ex. 5 at 16; Def.'s Ex. 3 at 16). In response, the Board informed plaintiff that, pursuant to its newly adopted 90% time-served policy, plaintiff "must serve 90% or 54 months of his sentence before any parole," and that "the Parole Board [would] not reconsider its decision...." (Pl.'s Ex. 5 at 13; Def.'s Ex. 3 at 13).

Consequently, plaintiff renewed his request for reconsideration by the Board, while also challenging his TPM before Georgia's Superior Courts Sentence Review Panel (Pl.'s Ex. 5 at 10, 12; Def.'s Ex. 3 at 10, 12). In both instances, plaintiff argued that the Board's decision to apply its 90% time-served policy to his offense retroactively increased the punishment inflicted upon him by the State of Georgia, in violation of the Ex Post Facto Clause of the United States Constitution. See U.S. Const. Art. I, § 10, cl. 1. Plaintiff's requests were subsequently denied on February 23, 2001 and March 27, 2001, respectively (Pl.'s Mot. for Equitable J., Ex. 4; Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8). In its March 27, 2001 letter to plaintiff, the Board observed that "[m]any inmates whose offenses were committed prior to January 1, 1998, but were convicted after January 1, 1998, as was [plaintiff], have been considered under the Board's 90% policy ... The Board is unwilling to deviate from the manner in which this policy has been adopted and implemented" (Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8).

Thereafter, on April 25, 2001, plaintiff filed a joint motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a complaint for damages pursuant to 28 U.S.C. §

1983[1-1], re-asserting his Ex Post Facto Clause challenge in this court. United States Magistrate Judge John R. Strother, Jr. subsequently issued a report and recommendation ("R & R") [6-1] recommending that plaintiff's § 2241 petition be dismissed without prejudice for failure to exhaust his available state remedies, see 28 U.S.C. § 2254(b)(1) (2001); that Georgia's Eleventh Amendment immunity warranted the dismissal of plaintiff's § 1983 claims for money damages, see U.S. Const. amend. XI; Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); and that plaintiff's § 1983 Ex Post Facto claim otherwise be permitted to proceed.

Over plaintiff's objections [7-1], the court adopted Judge Strother's R & R as the order of this court on March 7, 2002[8-1]. Yet, the court was unable to resolve plaintiff's motion for equitable judgment respecting plaintiff's surviving § 1983 claim [7-1], a motion that plaintiff had haphazardly incorporated into his objections to the magistrate's R & R. Specifically, the court noted that plaintiff's motion for equitable judgment, in which he sought to enjoin the Board's enforcement of the 90% time-served policy against him, was not in proper form. Plaintiff had failed to attach any affidavits in support of his factual contentions, in violation of Local Rule 7.1, see L.R. 7.1, NDGa., and plaintiff's factual allegations were insufficiently developed to properly adjudicate the motion. Nevertheless, the court determined that on its face, "[the Board]'s retroactive application of its 90% time-served policy to [plaintiff] [was] constitutionally suspect" (Order at 10). Accordingly, the court set the matter for an evidentiary hearing on April 10, 2002[9-1], at which time the Board was ordered to show cause, if any, why plaintiff's motion for equitable judgment should not be granted.

II. The April 10, 2002 Hearing

At the April 10, 2002 hearing, the Board offered testimony from Ms. Tracy D. Masters ("Masters"), Director

of the Board's Legal Services Division; Mr. Michael P. Sullivan ("Sullivan"), Director of the Board's Clemency Administration & Parole Selection Division; and Mr. Steve Baustin ("Baustin"), an Officer in the Board's Hearing Examiner Unit for Parole Decision Guidelines.

Baustin is one of ten hearing examiners responsible for the calculation of parole eligibility data and a TPM date for each inmate, which is then submitted to the Board for review. The Board thereafter votes to accept or reject the hearing examiner's recommendation. Although Baustin did not personally conduct the initial "months-to-serve" calculation respecting plaintiff's parole eligibility, he briefly outlined the standard procedure each examiner employs:

A. The Initial TPM Recommendation

First, the examiner identifies the inmate's "Crime Severity Level" on a table of offenses listed from least severe ("Level I") to most severe ("Level VII") (Pl.'s Ex. 4 at 2 ("Crime Severity Levels")). The table classifies aggravated assault as a "Level V" offense. Next, the hearing examiner calculates the inmate's "Total Parole Success Likelihood Score" on a "Parole Decision Guidelines" chart (Pl.'s Ex. 5 at 18; Def.'s Ex. 5; Def.'s Ex. 6). This score represents the sum of eight numerical "Parole Success Factors," historically-based data such as the inmate's number of prior convictions, previous parole or probation violations, and history of drug use. Based upon plaintiff's criminal and social history, plaintiff received a Total Parole Success Likelihood Score of 14.

Once the hearing examiner calculates the Crime Severity Level and Total Parole Success Likelihood Score, the examiner uses the two figures to identify the recommended number of "months-to-serve" on a Parole Decision Guidelines Grid (Pl.'s Ex. 4 ("Guidelines Grid")). For a "Level V" offense with a Parole Success Likelihood

Score of 14, the Guidelines Grid recommends that the inmate serve 34 months before being eligible for parole. Notably, the Guidelines Grid describes Parole Success Likelihood Scores in the 14-20 point range as "EXCELLENT."

The hearing examiner then calculates the inmate's TPM based upon the recommended months-to-serve from the Guidelines Grid. In plaintiff's case, for example, the 34 months-to-serve calculation would have generated a recommended TPM of October 2001. Yet, hearing officers cannot submit a TPM to the Board without also considering the minimum parole eligibility requirements: (1) the one-third time-served requirement under O.C.G.A. § 42-9-45(f); and (2) the 90% time-served policy. Further, according to Sullivan, the Director of the Board's Clemency Administration & Parole Selection Division, hearing examiners are instructed to recommend the lengthiest number of months-to-serve to the Board. Thus, as Baustin testified, the TPM date that the hearing examiner recommends to the Board will represent the greater of either (1) the inmate's Guidelines Grid score; or (2) 90% of the inmate's court-imposed prison sentence, if applicable to his offense.

Given his lack of involvement in plaintiff's initial TPM calculation, Baustin could only speculate as to why the Board assigned plaintiff a TPM of June 2003 instead of October 2001, the Guidelines Grid recommendation. He admitted, however, that the hearing examiner's application of the 90% time-served policy was the most likely explanation for the approximately 20-month disparity.

B. The Board's Discretion

Sullivan observed that, aside from the statutory minimum threshold set forth under O.C.G.A. § 42-9-45(f), the Board is not bound by the 90% time-served policy, the hearing examiner's TPM recommendation, or any other

calculations made by the hearing examiner. In fact, Sullivan asserted, in making his recommendation, the hearing examiner is "just doing math for the Board." He further testified that nothing prevents the Board from exercising its discretion, and that, in hundreds of cases, the Board has actually departed upward from the recommended TPM date resulting from the application of the 90% time-served policy. Additionally, Sullivan noted that even after the Board votes to approve a particular TPM date, the Board retains discretion to modify that date at any time, which it often does.

Masters, the Board's Director of Legal Services, likewise testified that the 90% policy is merely a "policy" that lacks the effect of law. Rather, she contended, the 90% time-served policy may be modified by the Board at any time, via a majority vote of its members. Masters argued that in enacting the policy, the Board simply wished to promulgate the manner in which it planned to exercise its discretion. The Board hoped to inform attorneys, judges, and criminal defendants of its intentions, and to dispel public misconceptions about Georgia's pardon and parole system.

Similarly, Baustin observed that the 90% time-served policy is "just another factor" the Board considers in making parole decisions. He noted that, irrespective of the hearing examiner's recommendation, the Board makes an individualized determination in each case.

On the other hand, on cross-examination, plaintiff elicited testimony from Sullivan indicating that, out of over 8,000 cases, the Board deviated downward from the 90% time-served policy only 10 or 11 times. Further, the Board apparently deviated downward in those 10 or 11 cases because of extraordinary circumstances (i.e., where the inmates at issue had rendered substantial assistance to prosecutors). Although Masters had similarly contended that the Board's broad discretion vitiated the importance of the

90% time-served policy, she admitted on cross examination that the Board follows the hearing examiner's TPM recommendation "all the time," perhaps in as many as 80% of the cases the Board reviews.

C. Reconsideration of the Board's TPM Notice

After the Board votes to accept or deny the TPM recommendation submitted by the hearing examiner, the Board notifies the inmate of its decision via a "Parole Decision Guidelines--Notice of Tentative Action" (Parole Decision Guidelines). Said notice includes, inter alia, the Board's TPM recommendation, the months-to-serve calculation generated from the Guidelines Grid, and the cumulative Parole Success Likelihood Score. Further, the notice indicates that "[a]ll decisions made by the Board are tentative and may be changed at the discretion of the Board at any time." At this point, the inmate may request that the Board reconsider his recommended TPM date.

Baustin, who personally reviewed plaintiff's request for reconsideration, testified that in his 23 years of employment with the Board, he has reviewed approximately 1,200 TPM "appeals" per year. Further, Baustin indicated that he has deviated from the Board's TPM decision, and recommended a different TPM, in approximately 20% of those cases. Baustin was unable to determine whether the TPM deviations within that 20% reflected months-to-serve increases, or months- to-serve decreases, but he reiterated that the Board ultimately has discretion to adjust the recommended TPM date in either direction.

When asked by the court whether, on reconsideration, the hearing examiner was authorized to deviate from the Guidelines Grid calculations, Baustin explained that the hearing examiner may include "comments" with his recommendation (Def.'s Ex. 6). Baustin noted that the hearing examiner's TPM recommendation is not always

"strictly by the grid," but that all of the pertinent Guidelines Grid figures are provided to the Board for review. Further, Baustin testified that the hearing examiner may include a "policy" recommendation in his submission to the Board.

On the other hand, Baustin's testimony also disclosed that the TPM "appeal" process is somewhat of a misnomer. In practice, the hearing examiner who reviews the inmate's request for reconsideration will not re-calculate the inmate's TPM, re-submit the inmate's parole eligibility data to the Board, or otherwise adjust the inmate's TPM date in any way absent a mathematical error warranting reconsideration. The "reconsideration" process may thus be more accurately described as a request for a TPM "recomputation." Moreover, Baustin asserted that the initial hearing examiner's application of the 90% time-served policy to calculate an inmate's TPM date, and the Board's subsequent acceptance of the examiner's recommendation, is not the sort of "error" warranting recomputation. Rather, according to Baustin, requests for reconsideration filed on this basis are summarily denied by the hearing examiners, ending the review process.

The typical errors Baustin encounters pertain to miscalculated Crime Severity Levels and Parole Success Likelihood Scores, and erroneous applications of the Board's 90% time-served policy (i.e., where the inmate's underlying offense does not fall within the group of offenses covered under the policy). Baustin discovers such errors in approximately 10% of the 30 requests for reconsideration he reviews each week. Even where computation errors are discovered, however, the hearing examiner will not re-submit a case to the Board for reconsideration if the case falls under the 90% time-served policy.[2]

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[2] Presumably, Baustin meant that such reconsideration would not take place, as a general rule, because the TPM date generated by the 90% time-served policy typically exceeds the Guidelines Grid

Finally, with respect to plaintiff's requests for reconsideration, Baustin observed that he personally denied plaintiff's requests on January 18, 2001 and February 17, 2001. Baustin asserted that, the Board having accepted the initial hearing examiner's 90% time-served recommendation, he saw no reason to depart from the TPM date at issue. Rather, Baustin testified, the Board would not likely have reconsidered its decision anyway. Baustin noted that although the Board has not made any official declaration to him indicating that the application of the 90% time-served policy is mandatory, the Board has "made it clear that ... [it] would not reconsider the 90% policy" in the TPM "appeal" context.

D. Plaintiff's Parole Success Likelihood

As to the likelihood that plaintiff would have received an earlier TPM but for the Board's application of the 90% time-served policy to his offense, Masters indicated that, in her opinion, such a result was unlikely. Rather, she testified that plaintiff's sentence was unusually short in proportion to the severity of his offense, that the recommendations generated from the Guidelines Grid do not bind the Board, and that irrespective of the adoption of the challenged policy, the Board could have required plaintiff to "max out," or serve his entire 5-year term of incarceration. In Masters' opinion, plaintiff's court-imposed prison sentence was unusually short in relation to similar offenses because the sentencing judge was probably aware of the Board's 90% time-served policy and considered the policy in rendering his sentence.

Utilizing incarceration data for aggravated assault offenders in the Georgia prison system, Sullivan also

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recommendation.

testified that, in his opinion, plaintiff's sentence was lighter than one might expect given the victim's injuries, plaintiff's use of a weapon, his prior criminal record, and his flight from the police (Def.'s Ex. 12). Further, Sullivan's testimony indicated that the average periods of incarceration imposed by the State of Georgia upon relevant aggravated assault offenders decreased slightly from 1996 (6.5 years imposed) through 2000 (5.9 years imposed), while the average time-served for such offenders increased slightly during the same period (from 2.9 years served in 1996 to 3.2 years served in 2000) (Def.'s Ex. 12). Thus, these statistics arguably corroborated Masters' contention that plaintiff received a lighter sentence because of the Superior Court's awareness of the 90% time-served policy. Yet, Sullivan also acknowledged that plaintiff received the maximum statutory sentence of 20 years, with 5 years to serve, and that plaintiff's "good work history" would have been considered at sentencing.

III. Plaintiff's Motion for Equitable Judgment

A. 42 U.S.C. § 1983

To articulate a cognizable claim under 42 U.S.C. § 1983, "plaintiff must show that a person, acting under color of any statute, ordinance, regulation, custom, or usage, deprived him of a right, privilege, or immunity secured by the Constitution." Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F.Supp.2d 1320, 1328 (N.D.Ga.2000). Plaintiff's § 1983 claim is rooted in the Board's alleged violation of plaintiff's rights under the Ex Post Facto Clause of the United States Constitution [1-1]. See U.S. Const. Art. I, § 10, cl. 1. The alleged violation stems from the Board's retroactive enforcement of its 90% time-served policy against plaintiff, thus the Board may fairly be characterized as "acting under color" of state law within the meaning of § 1983. 42 U.S.C. § 1983.

B. Analysis of Plaintiff's Ex Post Facto Claim

1. Ex Post Facto Standard

To prove that a retroactively applicable parole board procedure violates the Ex Post Facto Clause, a prisoner must show that the challenged action "creates a significant risk of prolonging [his] incarceration." Garner v. Jones, 529 U.S. 244, 251 (2000). In two recent opinions, one of which originated in this very district, the United States Supreme Court suggested that a retroactive amendment postponing a prisoner's initial parole eligibility date would offend the constitutional ban on Ex Post Facto legislation. See Garner, 529 U.S. at 250-51 (2000); California Dep't of Corrections v. Morales, 514 U.S. 499, 511 (1995). Additionally, nearly thirty years ago the Supreme Court observed that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the Ex Post Facto clause [citations omitted] of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the ... offense.'" Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974) (emphasis added) (quoting Rooney v. North Dakota, 196 U.S. 319, 325 (1905)). That same Supreme Court cited, with apparent approval, a decision of the United States Court of Appeals for the Ninth Circuit holding that "[u]nder California law, a convicted person's eligibility for parole consideration (as opposed to parole) is part of the 'law annexed to the crime when committed' ... and any legislative change in such eligibility which would work to a prisoner's disadvantage may not be retroactively applied." Love v. Fitzharris, 460 F.2d 382, 383 (9th Cir.1972), vacated on other grounds, 409 U.S. 1100 (1973). See also Akins v. Snow, 922 F.2d 1558, 1563 (11th Cir.1991), cert. denied, 501 U.S. 1260 (1991) (opining that the Ex Post Facto Clause "applies to a change in parole eligibility" because "parole eligibility must be considered part of any sentence....").

Nevertheless, the Supreme Court has declared that there is no "simple formula" for determining whether official rules or procedures violate the Ex Post Facto Clause. Garner, 529 U.S. at 252. Rather, in the pardons and paroles context, the inquiry ultimately boils down to whether, in light of all of the relevant facts and circumstances, the prisoner can show "through evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than [he would have received] under the earlier rule." Id. at 255. To make such a showing, the inmate need not prove "that he definitely would have served a lesser sentence under the previous legal regime," Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, 1149 (11th Cir.1995) (emphasis omitted) (citing Miller v. Florida, 482 U.S. 423, 432 (1987)), only that the challenged procedure creates a "sufficient risk" of doing so. Morales, 514 U.S. at 509.

To inform this analysis, courts should examine the parole board's internal policy statements, for "[a]t a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether ... the amendment [at issue] ... create[s] a significant risk of increased punishment." Garner, 529 U.S. at 256. Further, such "policies and practices will indicate the manner in which [the Board] is exercising its discretion." Id.

Ex Post Facto Clause analysis also requires courts to gauge the level of discretion actually exercised by the parole board in question. For example, both Garner v. Jones, 529 U.S. 244, and Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, involved ex post facto challenges to certain parole eligibility procedures that were retroactively enforced by Georgia's State Board of Pardons & Paroles, the defendant in the instant litigation. The Garner court examined a Board rule that retroactively decreased the

frequency, from three years to eight years, with which prisoners serving life sentences would be granted parole reconsideration hearings after an initial denial. See Garner, 529 U.S. at 247. In Jones, a Georgia inmate sought to enjoin the enforcement of a Board rule that retroactively required "Level V" offenders to serve the greater of either (1) the recommended months-to-serve from the Guidelines Grid; or (2) one-third of the court-imposed sentence of incarceration, before being eligible for parole. 59 F.3d at 1148. Previously, only the more serious "Level VI" and "Level VII" offenders were subject to the one-third time-served requirement; "the TPM of prisoners with [Crime Severity Levels] of I through V was determined, prior to any discretionary departure, solely by reference to the [Guidelines Grid]." Id. at 1147.

Although the United States Court of Appeals for the Eleventh Circuit had found, in Garner, that the challenged rule violated ex post facto, the Supreme Court ultimately reversed and remanded for further findings on grounds that the Eleventh Circuit failed to evaluate whether the rule actually posed a sufficient risk of increasing the inmate's punishment. See Garner 529 U.S. at 255. Specifically, the Supreme Court could not determine, from the record before it, whether the Board's discretion to grant a parole reconsideration hearing during the eight-year interval in which no hearing was due, or the Board's discretion to grant expedited reconsideration hearings in the event of a change in circumstances, vitiated the underlying ex post facto concerns. See id.

Likewise, the "undisputed fact" that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-recommendation in setting the TPM" was the key to the Eleventh Circuit's decision in Jones. 59 F.3d at 1149. Affirming the district court's conclusion that the Board's retroactive extension of the one-third time-served requirement to Level V offenders did not violate the Ex Post

Facto Clause, the Eleventh Circuit opined that "the degree of the Board's continuing parole discretion implies that the TPM rule change 'create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes....'" Id. (quoting Morales, 514 U.S. at 500).

Finally, several federal decisions suggest that a challenged parole eligibility method, policy, or procedure need not necessarily take the form of a law, rule, or regulation to implicate the Ex Post Facto Clause. See, e.g., Garner, 529 U.S. at 255 (opining that ex post facto plaintiff must show that the rule has the effect of retroactively increasing his punishment); United States v. Adeleke, 968 F.2d 1159, 1160 (11th Cir.1992) (opining that the retroactive use of an application note to the federal sentencing guidelines, lacking "the force of law," cannot be deemed to have "changed the law" for ex post facto purposes.); Akins, 922 F.2d at 1561 (11th Cir.1991) (opining that the rules and regulations of the Board, a quasi-legislative entity, implicate ex post facto because they have the force and effect of law); Dufresne v. Baer, 744 F.2d 1543, 1550 (11th Cir.1984) (opining that the federal parole guidelines lacked "the characteristics of law ... They are not filed and rigid, but are flexible" and, therefore, did not violate the Ex Post Facto Clause); United States ex rel. Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 (5th Cir.1980) (opining that any "official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription."); Warren v. Baskerville, 233 F.3d 204, 208 (4th Cir.2000) (opining that a retroactive parole "policy" change "did not for ex post facto purposes have the force and effect of law."); Hill v. Jackson, 64 F.3d 163, 169-70 (4th Cir.1995) (opining that parole reconsideration "policy" did not violate ex post facto because application of the policy was not "automatic," appeals were permitted, and the policy did not affect standards for initial parole consideration); Hamm v. Latessa, 72 F.3d 947, 957 (1st Cir.1995)

(observing, in dicta, that a retroactively applicable parole policy would constitute a "law" within the meaning of the Ex Post Facto Clause if it "possess[ed] the full force and effect of law...."); Geraghty v. U.S. Parole Commission, 579 F.2d 238, 267 (3d Cir.1978), vacated on other grounds, 445 U.S. 388 (1980) (noting that parole "guidelines" would violate ex post facto if applied in a fixed and mechanical way); Love, 460 F.2d at 385 (9th Cir.1972) (opining that a parole board's retroactive interpretation of a parole eligibility provision was subject to ex post facto constraints because the interpretation had the effect of law); Oglesby v. Ray, 8 F.Supp.2d 1379, 1380 (N.D.Ga.1998) (Thrash, J .), rev'd on other grounds, 180 F.3d 272 (11th Cir.1999) (applying ex post facto analysis to a retroactive parole board "policy").[3] Rather, as noted, ex post facto considerations apply in the parole eligibility context to any official policy or procedure that has the full force and effect of law, and whose practical implementation produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. Morales, 514 U.S. at 509.

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[3] In Oglesby v. Ray, the district court initially determined that the challenged parole reconsideration "policy" withstood ex post facto scrutiny because it did not create a sufficient risk of retroactively increasing the inmate's punishment. See 8 F.Supp.2d at 1383. The United States Court of Appeals for the Eleventh Circuit subsequently reversed and remanded the case for further consideration in light of its intervening decision in Jones, 59 F.3d 1145. See Oglesby v. Ray, No. 1:97-CV-527-TWT (N.D. Ga. order filed on April 23, 1999 [19-1]). On remand, the district court found the policy violative of the Ex Post Facto Clause [26-1]; however, the Eleventh Circuit once again reversed the ruling in light of the intervening decision of the United States Supreme Court in Garner, 529 U.S. 244 [31-1]. Finally, on November 6, 2001, the district court ultimately dismissed the inmate's action as moot, given the Board's voluntary cessation of the application of the challenged policy [36-1]. Accordingly, the Eleventh Circuit never specifically addressed whether the district court properly treated the challenged "policy" as a "law" for ex post facto purposes.

2. Plaintiff's Challenge to the Board's 90% Time-Served Policy

Plaintiff contends that under the guidelines in effect when he committed his crime, he would have been entitled to an initial parole eligibility hearing on or about August 23, 2000, after having served twenty months of his five-year prison term (Pl.'s Mot. for Equitable J. at 3).[4] But for the Board's retroactive application of its 90% time-served policy to his offense, he argues, the relevant hearing examiner would have recommended a TPM date based upon service of one-third of his court-imposed prison sentence, see O.C.G.A. § 42-9-45(f); the Board would have simply adopted said recommendation as a matter of routine practice; and plaintiff would likely have been paroled on or about the adopted TPM date, given that the Guidelines Grid rated his chance of parole as "excellent." Instead, he claims, the Board rigidly enforced its 90% time-served policy against him, retroactively extending his TPM date from August 23, 2000 to June of 2003, and increasing the length of his confinement by approximately 34 months (Pl.'s Mot. for Equitable J. at 3).

According to the evidence presented at the April 10, 2002 hearing, however, plaintiff's position is not entirely accurate. Rather, the testimony of Sullivan and Baustin established that hearing examiners are instructed to recommend the lengthiest number of months-to-serve under the guidelines. Additionally, the Guidelines Grid indicates that, "[f]or certain Crime Severity Level V, VI, and VII offenses, the Guidelines recommendation will be one-third of the court-imposed sentence length or the grid recommendation, whichever is greater" (Guidelines Grid (emphasis omitted)). Accordingly, even if the 90% time-served policy did not apply to plaintiff's offense, the Board

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[4] Plaintiff contends that he is entitled to credit for time served towards his August 4, 1999 sentence (217 days of pre-trial confinement) (Compl.¶ 7).

would likely have adopted the 34 months-to-serve recommendation, it being the lengthier of the recommendations generated from the Guidelines Grid (34 months) and the one- third requirement (20 months). Therefore, plaintiff could have at best expected a TPM date of October 2001 (34 months), rather than June 2003 (54 months).

Nevertheless, the approximately 20-month disparity about which plaintiff complains is not to be taken lightly. If the Board has inflexibly enforced its 90% time-served policy against plaintiff, such that its application has the force and effect of law, then the Board has created a risk of retroactively increasing his punishment. Further, if plaintiff would likely have been paroled sooner than June 2003 but for the Board's allegedly unconstitutional action, then said risk is "sufficient" to render the policy violative of the Ex Post Facto Clause. Morales, 514 U.S. at 509.

After careful review and consideration, the court answers both of these questions in the affirmative. The testimony presented to the court on April 10, 2002 established that although the Board is authorized to exercise discretion, and that the TPM recommendations are merely "recommendations" that remain "tentative" even after the Board votes to accept them, the Board does not in fact exercise any meaningful discretion in cases falling under its 90% time- served policy. Rather, the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates. The statistical evidence, the procedures in effect, the text of the resolution itself, and the Board's internal policy statements and guidelines provide overwhelming evidence, both direct and circumstantial, of this fact.

a. The Practical Implementation of the 90% Policy

The evidence presented at the April 10th hearing indicated that, from January 1, 1998 through June 30, 2001, the Board deviated below the 90% threshold in exactly 10 cases out of 8,664 (Def.'s Ex. 8). Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero. Application of the 90% time-served policy is virtually automatic; the TPM calculation generated by the 90% time- served policy will inevitably reflect the highest number of months-to-serve submitted to the Board, a figure that the Board will always adopt. Thus, the change in the TPM formula at issue in this case is a far cry from the change examined by the Eleventh Circuit in Jones, where the court determined that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-recommendation in setting the TPM." Jones, 59 F.3d at 1149. Here, by contrast, the Board exercises unwavering adherence to the challenged 90% benchmark.

The TPM "reconsideration" process is further evidence that the Board blindly applies the 90% time-served policy. In truth, the hearing examiner who conducts this purely "paper" review exercises no discretion with respect to 90% cases. Unless an initial hearing examiner erroneously calculates the inmate's TPM date under the 90% time-served policy, when in fact the inmate's offense does not fall under that policy, hearing examiners will not re-submit recommendations to the Board even if the initial recommendations contain mathematical errors. He alone makes this decision, unilaterally ending the review process without any adversarial hearing or meaningful reconsideration.

b. The Board's Internal Policy Indicators

Likewise, the Board's December 9, 1997 resolution adopting the challenged policy, as well as the Board's related guidelines and policy statements, serve as circumstantial evidence that the 90% time-served policy is applied mandatorily. The pertinent text of the resolution provides:

> WHEREAS: Since 1991, the Board has steadily and consistently amended and refined its guidelines to provide for lengthier time-served for violent and dangerous criminals while reducing the overall number of individuals released on parole; and,
>
> WHEREAS: The Board believes that a further amendment to its statutorily mandated guidelines will further enhance public safety and make Georgia the toughest state in the nation for "time-served" for violent felonies and residential burglaries;
>
> THEREFORE: Be it now hereby resolved by the [Board] that its statutorily mandated guidelines are hereby amended to provide that any offender who is convicted on or after January 1, 1998, of one or more of [20 enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison.

(90% time-served policy at 1). This language clearly expresses the Board's intent to lengthen the actual time certain inmates serve in prison, "mak[ing] Georgia the toughest state in the nation" in this regard, and declares that, with respect to covered offenders, service of a minimum of 90% of the court- imposed term of incarceration "will be

required " (90% time-served policy at 1 (emphasis added)).[5]

The policy statement published on the Board's internet home page similarly declares that "[t]he Board requires all violent offenders ... to serve a minimum of 90 percent of their court-imposed terms of incarceration." State of Georgia Board of Pardons & Paroles, "90-Percent Policy," Parole Consideration and Eligibility (www.pap.state.ga.us/eligibility.html, visited on May 2, 2002) (emphasis added). Finally, the text accompanying the Guidelines Grid indicates:

> "Board's 90% Resolution: Pursuant to Board policy, for persons CONVICTED on or after January 1, 1998, the Guidelines recommendation will be 90% of the court-imposed prison sentence or the Grid recommendation, whichever is greater....

(Guidelines Grid). In each of these examples, no discretion is implied. Instead, the Board's language is unambiguously mandatory, further supporting plaintiff's contention that the Board's enforcement of the 90% time-served policy has the force and effect of law for ex post facto purposes.

c. Plaintiff's Parole Success Likelihood

Given this determination, the challenged action violates the Ex Post Facto Clause if there is a substantial likelihood that plaintiff would have been paroled earlier had the Board not retroactively enforced its 90% time-served policy against him. As noted, the Guidelines Grid rates the

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[5] Notably, in reviewing the parole procedures at issue in *Garner,* the Supreme Court declared: "Absent a demonstration to the contrary, we *presume* the Board follows its ... internal policies in fulfilling its obligations." 529 U.S. at 256 (emphasis added).

range within which plaintiff's 14-point Parole Success Likelihood Score falls as "excellent." Yet, both Masters and Sullivan opined that plaintiff would not likely have been paroled even if the 90% time-served policy did not apply to his offense. Masters and Sullivan explained that, in their opinion, the Superior Court sentenced plaintiff to an unusually light term of confinement, anticipating that the Board would require plaintiff to serve at least 90% of it. Thus, they argued, the Board would not likely have recommended an October 2001 TPM even without the 90% requirement.

The statistical evidence presented at the April 10th hearing nonetheless established that although plaintiff received a shorter than average prison term, his term (5 years) was shorter than average as compared to all non-life aggravated assault sentences imposed during 1998 (6.3 years), a year in which Superior Court judges would have been aware of the new 90% requirement (Def.'s Ex. 12). It is fair to infer, therefore, that the sentencing court imposed a shorter than average term not because of its awareness of the 90% requirement, but because it did not regard plaintiff's crime as particularly egregious as compared to other aggravated assaults. Further, the court notes that plaintiff's June 2003 TPM would require him to serve 54 months, or 4.5 years, a prison term that greatly exceeds the average time-served attributable to all aggravated assault offenders released from 1996 through 2001 (Pl.'s Ex. 6 at 3; Def.'s Ex. 12). The court cannot reconcile this fact with plaintiff's 34-month grid score and his parole success rating of "excellent" without concluding that plaintiff would likely have received an earlier TPM date but for the Board's retroactive application of the 90% time-served policy. Accordingly, plaintiff has made the requisite showing of unconstitutionality under the Ex Post Facto Clause.

IV. Prerequisites for Injunctive Relief

To prevail on a motion for injunctive relief, a plaintiff must establish the following four factors: (1) actual success on the merits; (2) a threat of irreparable injury; (3) that plaintiff's own injury would outweigh the injury to defendant; and (4) that an injunction would not disserve the public interest. See Tefel v. Reno, 180 F.3d 1286, 1295 (11th Cir.1999); Spottsville v. Barnes, 135 F.Supp.2d 1316, 1318 (N.D.Ga.2001) (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)). See also Siegel v. LePore, 234 F.3d 1163, 1213 (11th Cir.2000) (Carnes, J., dissenting). With respect to plaintiff's ex post facto claim, the court concludes that plaintiff's showing justifies the injunctive relief he seeks. Accordingly, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1].

IV. Conclusion

Having determined that the Board's retroactive enforcement of its 90% time- served policy against plaintiff is unconstitutional and invalid for the reasons set forth herein, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1]. Defendant State Board of Pardons & Paroles, its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with the State Board of Pardons & Paroles who receive actual notice of this order by personal service or otherwise, are hereby **RESTRAINED** and **ENJOINED** from taking any actions of any kind, legal or otherwise, to carry out, assert and/or enforce the 90% time-served policy as it relates to this individual--plaintiff Coleman Jackson. Defendant is hereby **ORDERED** to provide plaintiff with an initial parole eligibility hearing within **FORTY-FIVE (45) DAYS** of the issuance of this order. Further, defendant is hereby **ORDERED** to consider plaintiff's parole eligibility without regard to the 90% time-served policy. To the extent that plaintiff's counsel has moved for an order directing plaintiff's

immediate release from custody, said motion is hereby **DENIED**. Nevertheless, the court will reconsider plaintiff's request if defendant fails to comply with this order.

IT IS SO ORDERED, this 29th day of May, 2002.

s/ *William C. O'Kelley*
William C. O'Kelley
Senior United States District Judge